No. 91-6824-CFY Title: Gloria Zafiro, Jose Martinez, Salvador Garcia and Alfonso Soto, Petitioners
Status: GRANTED v.
United States

Docketed:
December 23, 1991 Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Cunniff,Kenneth

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 23 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jan 27 1992		Order extending time to file response to petition until February 26, 1992.
5	Feb 26 1992		Brief of respondent United States filed.
6	Mar 5 1992		DISTRIBUTED. March 20, 1992
8	Mar 23 1992		Petition GRANTED.
			**********
14	Apr 14 1992		Record filed.
		*	Partial proceedings and briefs U.S. Court of Appeals forthe Seventh Circuit.
9	Apr 22 1992	G	Motion of petitioners for appointment of counsel filed.
11	May 6 1992		Order extending time to file brief of petitioner on the merits until May 28, 1992.
12	May 11 1992		DISTRIBUTED. May 15, 1992 (Appointment of counsel)
15	May 11 1992		Record filed.
		*	Original proceedings U.S. District Court, Northern District of Illinois. (1 BOX)
16	May 13 1992		Joint appendix filed.
13	May 18 1992		Motion for appointment of counsel GRANTED and it is ordered that Kenneth L. Cunniff, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the petitioners in this case.
17	May 28 1992		Brief of petitioners Gloria Zaifro, et al. filed.
18	Jul 1 1992		Brief of respondent United States filed.
19	Jul 14 1992		CIRCULATED.
21	Jul 22 1992	X	Reply brief of petitioners Gloria Zaifro, et al. filed.
20	Aug 21 1992		SET FOR ARGUMENT MONDAY, NOVEMBER 2, 1992. (4TH CASE).
22	Nov 2 1992		ARGUED.

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Respondent,

v.

**GLORIA ZAFIRO, JOSE MARTINEZ,
SALVADOR GARCIA, ALFONSO SOTO,**

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Seventh Circuit Court of Appeals correct in ruling that under Rule 14 of the Federal Rules of Criminal Procedure, that two defendants are not entitled to severance when it is certain that one, but not both committed the crime and the only uncertainty is which one, which is contrary to the Seventh Circuit's previous decision in United States v. Ziperstein, 601 F.2d 281 (7th Cir. 1979), the Eleventh Circuit's decIsion in Smith v. Kelso, 863 F.2d 1547 (11th Cir. 1989) and the Fifth Circuit's decision in United States v. Romanello, 726 F.2d 173 (5th Cir. 1984).

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PRAYER FOR RELIEF

Petitioners Gloria Zafiro, Jose Martinez, Salvador Garcia and Alfonso Soto pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on September 26, 1991.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at _____ F.2d _____. This opinion is printed in the appendix (A.1) to this petition. The United States District Court for the Northern District of Illinois did not issue a written opinion in this case. The judgment appealed from is contained in the appendix (A.2) to this petition.

JURISDICTION OF THIS COURT

The Seventh Circuit Court of Appeals issued its opinion in this matter on September 26, 1991. No petition for a rehearing was filed in this matter. This petition was filed within 90 days after the entry of the Seventh Circuit's decision in this matter. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Rule 14 of the Federal Rules of Criminal Procedure authorizes a trial court to sever defendants for separate trials:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires." [emphasis added]

STATEMENT OF THE CASE

Defendants were charged in the United Court for the Northern District of Illinois, Eastern Division, with having conspired to possess cocaine, heroin and marijuana with intent to deliver in violation of 21 U.S.C. 841(a) and 846 and possession of cocaine, heroin and marijuana with intent to distribute in violation of 21 U.S.C. 841(a).

Prior to trial, Soto and Martinez moved for a severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure. (Soto R. 45; Martinez R. 80; Trial Tr. 4-5) Judge Bua, however, denied both motions. (Soto R. 66; Trial Tr. 6) Counsel for Garcia made motions for mistrial and renewed motions for a mistrial based on trial testimony. (Trial Tr. 444, 614-15, 748, 831, 881)

Defendants were jointly tried to a jury, which found Jose Martinez, Alphonso Soto and Salvador Garcia guilty of each count which they were charged. Gloria Zafiro was found guilty of conspiring to possess cocaine, heroin and marijuana with intent to distribute, but not guilty of the substantive counts of possession of cocaine, marijuana and heroin with intent to distribute.

Gloria Zafiro, Alphonso Soto and Salvador Garcia were sentenced to one hundred fifty one (151) months imprisonment, to be followed by a five (5) year term of supervised release.

Jose Martinez was sentenced to two hundred sixty two (252) months imprisonment, to be followed by a five (5) year term of supervised release.

Defendants timely filed their Notices of Appeal with the

Seventh Circuit Court of Appeals on November 17, 1989, November 30, 1989, December 15, 1989 and December 6, 1989, respectively. The Seventh Circuit Court of Appeals affirmed the Defendants convictions by an opinion issued on September 26, 1991.

ARGUMENT

Under Supreme Court Rule 10, this Court has listed three general areas that would warrant granting a Writ of Certiorari. One of these reasons is a conflict between the decision of the circuit court and other circuits, or a conflict between the circuit court and opinions of this court, or has otherwise so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. Supreme Court Rule 10.1(a); Crane v. Kentucky, 476 U.S. 683, 687 (1986).

In this case, the decision of the Seventh Circuit is directly contrary to the long-standing legal rule that mutually antagonistic defenses are grounds for a severance under Rule 14. Indeed, the opinion of the court conceded that the decision was contrary to well-established legal principles. See, Slip op. at 3-4.

While the general rule is that persons jointly indicted should be jointly tried, thus promoting judicial efficiency, where there is a risk of prejudice to one party, severance should be granted. United States v. Lane, 474 U.S. 438, 449 n.12 (1986); United States v. Snively, 715 F.2d 260 (7th Cir. 1983), cert. denied 465 U.S. 1007 (1984).

Severance pursuant to Rule 14, is appropriate where co-

defendants have antagonistic defenses. United States v. Oglesby, 764 F.2d 1203 (7th Cir. 1985). Severance should be granted where acceptance of one defendant's defense precludes acceptance of the other defendant's defense. United States v. Buljubasic, 808 F.2d 1260, 1263 (7th Cir. 1987); United States v. Gironda, 758 F.2d 1201, 1220 (7th Cir. 1985).

The Seventh Circuit in this case concluded that these well-established principles did not apply, because this was a case of mere "finger-pointing" where one Defendant attempted to shift blame to another. However, a review of the facts in this case belies this assumption by the Seventh Circuit. Instead, this was a case where the Government heavily relied upon the co-defendants' antagonistic defenses to obtain a conviction.

This was particularly true in the case of Jose Martinez. As long as the Government could defeat a Motion for Judgment of Acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure at the close of its case in chief, co-defendant Gloria Zafiro's defense virtually assured a conviction of Martinez. The cross-examination of the Government's second witness, Maria Viera highlights the antagonism between these two defendants' positions. Objecting to Martinez's cross-examination of Viera, Zafiro's attorney stated that:

> "I believe the evidence will show that this lady had three kilos of cocaine in her car which was registered to her. That at the time of the incident, as a result and I believe there was no arrest of her; she was not prosecuted for whatever reason, I think that is a proper approach to take, and it is merely by an accident in geography that my client whose residence was used as a storage by the co-defendant, and, therefore, inculpated

my client by his presence in her home, I think the jury could reasonably infer from that behavior, the keeping of her, the maintaining of the residence, buying her cars, supplying her food, which I believe the evidence will show is exactly the same scenario as my client had, yet, this lady, for whatever reason, is not prosecuted nor arrested. And I think the analogy is exactly the same. My point is my client should not be here, because the only reason she is here is that Jose Martinez stored his cocaine and other items at her residence, unbeknownst to her and without her active participation" (Trial Tr. p. 80).

It is noteworthy that Zafiro's attorneys closing argument continually analogized Gloria Zafiro to Maria Viera, in that each were used by Jose Martinez so he could store narcotics in their property. (Trial Tr. 783-785, 789)

Gloria Zafiro testified that the burgundy suitcase which contained the cocaine, marijuana and heroin which formed the basis for counts 2, 3 and 4 of the indictment was brought into her apartment by Jose Martinez two (2) days prior to their arrest. Further, she testified that she had no idea what was in the suitcase and never handled it. (Trial Tr. 57, 75, 86, 346-347, 518-519, 542-543, 567, 579, 322-323, 326-328).

In fact, Zafiro testified that she had seen the suitcase inside the bedroom closet. (Trial Tr. 542-543). The suitcase, however, was found outside the closet. (Trial Tr. 347, 356).

Zafiro also testified that the bag which contained approximately $22,000.00 in United States currency was brought into her apartment the morning of their arrest by Jose Martinez. (Trial Tr. 57, 86, 273, 348, 358, 363, 520-521, 545, 571, 574, 576, 880).

Zafiro testified that Martinez asked her to safeguard the bag, which she believed contained Tavern proceeds. Although she

testified she placed the bag on top of a knapsack in her closet, the currency was found inside the knapsack in the bedroom where Martinez had been sleeping. (Trial Tr. 57, 86, 273, 348, 358, 363, 520-524, 542-549, 571-576).

What Gloria Zafiro told that jury was that she was being used by Jose Martinez, who without her knowledge brought and was bringing narcotics and currency into her apartment, and while purportedly sleeping handled the narcotics and currency.

Gloria Zafiro did not stop there, however. She testified that on two (2) occasions on February 22, 1989, strangers came to her apartment to see Jose Martinez. Each time she testified she had no conversation with them other than to say Jose was asleep. (Trial Tr. 535-529, 549-550, 556-559, 572).

According to Gloria Zafiro when Soto and Garcia arrived sometime later that day, they were carrying a box which contained cocaine. To no one's surprise, they again ask for Jose Martinez. Zafiro testified she went into the bedroom to make the bed and had no idea what was going on. (Trial Tr. 529-530, 550-551, 571-573, 580-584).

Jose Martinez denied the charges against him and elected not to testify nor present evidence. Specifically, he denied any knowledge of the heroin, cocaine, marijuana and currency in Zafiro's bedroom and denied any knowledge of the cocaine which was in the box carried by Soto and Garcia. His theory of defense was that he was in the wrong place at the wrong time, and that his mere presence provided Zafiro the opportunity to protect herself by

casting the blame on him. (Trial Tr. 796-797, 801, 304, 806).

It is respectfully asserted that acceptance of Zafiro's defense, that without her knowledge Martinez brought and arranged to bring narcotics into her house precluded acceptance of Martinez' defense, that without his knowledge Zafiro had narcotics in and was having narcotics delivered to her house.

Had the district court severed Zafiro and Martinez' trials, the jury never would have heard Zafiro's prejudicial and biased testimony.

Similarly, Defendant Garcia was prejudiced by his inclusion in the case with his co-Defendant Soto. One of the witnesses, Maurice Dailey, testified that on February 22, 1989, a surveillance was conducted by Dailey and several other officers under his supervision, at 1925 South 51st Court in Cicero, Illinois (Trial Tr. 42). Dailey observed a maroon Buick, identified to have been driven by Alfonso Soto (Trial Tr. 45), pull from the front of the residence and was followed by several persons on the surveillance team (Trial Tr. 44) to 3517 West 38th Street (Trial Tr. 46). Dailey further stated that at this time, Appellant Garcia joined Soto (Trial Tr. 48). Thomas Bridges, witness for the government, testified that he saw Soto and Appellant Garcia leave the premises of 5317 West 38th Street carrying a brown cardboard box (Trial Tr. 269). Dailey also related that the two gentlemen returned to the original residence at 1925 South 51st Court in Cicero (Trial Tr. 48).

Dailey stated that he was witness to Soto and Appellant Garcia

carrying this large cardboard box up the stairs (Trial Tr. 49). It was at this time that Dailey announced he was a police officer (Trial Tr. 49), and chased Soto and Garcia into an apartment where Jose Martinez and Gloria Zafiro were residing (Trial Tr. 50). Dailey discovered that the contents of the box Soto and Garcia was carrying, was twenty seven packages of cocaine (Trial Tr. 52), (Trial Tr. 58). At this time, Dailey arrested Garcia and the three other individuals above mentioned (Trial Tr. 53), and directed two other officers to return to 3517 West 38th Street and wait until they received a search warrant for that location (Trial Tr. 53).

When the officers arrived at that residence which belonged to Soto (Trial Tr. 304), a woman answered the door and consented to a search of the place and the officers found a scale known to be used when packaging drugs (Trial Tr. 54). Dailey continued his testimony by revealing that after going into the garage and opening the trunk of a black Ford Probe which was registered to a Maria Vera (Trial Tr. 162), he found a duffel bag with taped packages within it that was later determined to have contained cocaine (Trial Tr. 55). The keys for the Ford Probe were found on the person of Soto (Trial Tr. 56). Dailey further related that a search warrant was issued for the residence on 1925 South 51st Court (Trial Tr. 56), and a suitcase was discovered to contain marijuana, heroine and cocaine (Trial Tr. 58).

Dailey testified to have found a drivers license and voters registration card of Appellant Garcia with the address 5317 West 38th Street on them (Trial Tr. 66), yet further testified that the

drivers license was issued July 31, 1985 and expired April 4, 1989 (Trial Tr. 147) and the voters registration card was from 1987 (Trial Tr. 148). Dailey verified that appellant Garcia did, at one time, own the house on 38th Street, but Appellant Garcia sold it (Trial Tr. 146).

Garcia's defense was that he was never actually in possession of the cocaine, (Trial Tr. 839), and that the possession of the cocaine was co-defendant Soto, was legally, factually, and logically rebutted by the actual defense and trial testimony of Soto who testified that the Appellant Garcia was the mastermind and knowing possessor of the cocaine, (Trial Tr. 663-664).

In this case, presenting Appellant Garcia's defense under the circumstances of facing both the government and second prosecutor (Soto), the likelihood of confusion and the resulting denial of a fair trial was inexcusable. See, United States v. Ziperstein, 601 F.2d 281, 285 (7th Cir. 1979) and United States v. Romanello, 726 F.2d 173, 174, 182 (5th Cir. 1984). The seventh circuit's opinion completely ignores these facts presented by Garcia, and fails completely to mention either Ziperstein or Romanello.

This omission by the seventh circuit is not surprising, for the opinion in this case must either overrule ignore Ziperstein. This case is close to the situation mentioned by the seventh circuit in United States v. Ziperstein, 601 F.2d 281 (7th Cir. 1979):

> An example of "mutually antagonistic" defenses is presented in DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962). In DeLuna one defendant claimed that he came into possession of narcotics only when the other

> defendant saw the police approach and shoved the drugs into his hands. The other defendant, however, denied having ever possessed the drugs and claimed that they had always been in the possession of the first defendant. In a case such as DeLuna, where someone must have possessed the contraband, and one defendant can only deny his own possession by attributing possession and consequent guilt to the other, the defenses are antagonistic. 601 F.2d at 285 (7th Cir. 1979)

Accord, Smith v. Kelso, 863 F.2d 1564, 1569-1571 (11th Cir. 1989).

Likewise, in United States v. Romanello, 726 F.2d 173 (5th Cir. 1984), the Fifth Circuit in the colorful language of Judge Goldberg made the following salient comments on the antagonism of defenses and defendant and the effects of such a situation upon a fair trial:

> Conspiracy trials, with their world-girdling potential, are given more extensive thrust by the admission of hearsay testimony, the use of conspiratorial acts to prove substantive offenses, and the joint trial of defendants. These pressures along threaten to undermine the fair consideration of individual conspiracy defendants. However, the dangers inherent in joint trials become intolerable when the co-defendants become gladiators, ripping each other's defenses apart. Int heir antagonism, each lawyer becomes the government's champion against the co-defendant, and the resulting struggle leaves both defendants vulnerable to the insinuation that a conspiracy explains the conflict. 726 F.2d at 182

And also:

> "I saw a lizard come darting forward on six great taloned feet an fasten itself to a [fellow soul]...[T]hey fused like hot wax, and their colors ran together until neither wretch nor monster appeared what he had been when he began..."[citing Dante, The Inferno, Canto XXV, Circle 8, Bolgia 7, lines 46-48, 58-60 (J. Ciardi, transl)].
>
> The joint trial of conspiracy defendant was originally deemed useful to prove that the parties planned their crimes together. However, it has become a powerful tool for the government to prove substantive

> crimes and to cast guilt upon a host of co-defendants. In this case, we are concerned with the specific prejudice that results when defendants become weapons against each other, clawing into each other with antagonistic defenses. Like the wretches in Dante's hell, they may become entangled and ultimately fuse together in the eyes of the jury, so that neither defense is believed and all defendants are convicted. Under such circumstances, the trial judge abuses its discretion in failing to sever the trials of the co-defendants. 726 F.2d at 174

Either Zafiro had no knowledge of the narcotics and Martinez did or Martinez had no knowledge of the narcotics and Zafiro did. Both positions cannot be true and therefore acceptance of one defense precluded acceptance of the others. Thus, Zafiro and Martinez did not merely say "The other person did it", instead their defenses were "I could not possibly have done it." Whether the co-defendants were present in the case or not, either would have been entitled to trial based upon the facts presented solely against each individual.

Thus, this case is not one where the defendants were offering up another "live body" as opined by the Seventh Circuit. Slip op. at 7. It does a disservice to the doctrine that defendants are entitled to a trial based solely upon the evidence against an individual to reach the conclusion reached by the Seventh Circuit in this case. Instead, this case a case where the Government could, in large part, sit back and let the Defendants' antagonistic defenses prove the Government's case.

The omission of any discussion of this applicable case law can only be explained by the seventh circuit's apparent belief that a trial court's ruling on a severance is never reviewable on appeal.

This belief was expressed by the court when it said

> [t]he argument that a conviction should be reversed because the district judge failed to sever properly joined defendants for trial is nearly always futile even when the defendants can be said to be presenting mutually antagonistic defenses.

Slip op. at 7 (emphasis added). Thus, this panel of the seventh circuit apparently believes that even when the trial court was dead wrong and the defendants should have been severed for trial, no reversal is in order.

This is not the law. This court should accept the Petition for Certiorari to prevent this view of severance and appellate review from spreading. Otherwise, the opinion below will completely eviscerate the law of severance. The doctrine that each defendant is entitled to a fair trial based upon the evidence against him or her will be a hollow, empty, slogan, without effect.

CONCLUSION

The Seventh Circuit's opinion in this case is a substantial departure from the existing law of severance. This court should grant the Petition and issue a Writ of Certiorari to the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 89-3520, 89-3639,
89-3660, 89-3729

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GLORIA ZAFIRO, JOSÉ MARTINEZ,
SALVADOR GARCIA, and ALFONSO SOTO,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 165—Nicholas J. Bua, *Judge*.

ARGUED JUNE 14, 1991—DECIDED SEPTEMBER 26, 1991

Before POSNER, MANION, and KANNE, *Circuit Judges*.

POSNER, *Circuit Judge*. The four defendants were tried together by a jury for offenses involving cocaine and other illegal drugs, and all were convicted. José Martinez was sentenced to 262 months in prison and the three other defendants—Alphonso Soto, Salvador Garcia, and Gloria Zafiro—to 151 months each even though the jury had acquitted Zafiro of possession with intent to distribute and convicted her only of participating in, or aiding and abetting, conspiracy. The verdict does not distinguish between actual participation on the one hand and aiding and abetting on the other. At first glance it might seem odd that

there could be (as the cases hold there can be, *United States v. Galiffa*, 734 F.2d 306 (7th Cir. 1984)) separate crimes of conspiracy and of aiding and abetting a conspiracy—for would not the act of aiding and abetting make the aider and abettor a member of the conspiracy? Not necessarily. Suppose someone who admired criminals and hated the police learned that the police were planning a raid on a drug ring, and, hoping to foil the raid and assure the success of the ring, warned its members—with whom he had had no previous, or for that matter subsequent, dealings—of the impending raid. He would be an aider and abettor of the drug conspiracy, but not a member of it. *United States v. Lane*, 514 F.2d 22 (9th Cir. 1975). For the essence of conspiracy is agreement, and there is none in our hypothetical case.

Of the issues raised by the defendants on appeal only two have sufficient merit to warrant discussion. The first is whether the judge should have granted the motions of Martinez, Soto, or Garcia for severance of their trials; the second is whether a reasonable jury could have found Zafiro guilty beyond a reasonable doubt. The government's case was simple. The three male defendants were acquaintances and Zafiro was Martinez's girl friend. The defendants operated a business of distributing illegal drugs at two locations—Zafiro's apartment in Cicero, Illinois, and Soto's bungalow-with-detached-garage in Chicago. One day, government agents followed Soto and Garcia as they transported a large box in Soto's car from Soto's garage to Zafiro's apartment. The agents identified themselves as they followed the two up the stairs to the apartment. Soto and Garcia dropped the box and ran into the apartment, closely followed by the agents, who found all four defendants in the living room. The box contained 55 pounds of cocaine. Another 20 pounds were found in a suitcase in a closet in Zafiro's apartment and in a car in Soto's garage. The car was registered to another girl friend of Martinez's; he had given the car to her as a present but she had never used it.

The basis of the motions for severance by Soto and Garcia was that their defenses were mutually antagonistic. Soto testified that he didn't know anything about any drug conspiracy: Garcia had asked him for a box and he had given it to him; he didn't discover what was in it until it was opened when they were arrested. Garcia did not testify but his lawyer argued in closing argument that it was Soto's box and Garcia had known nothing about it. The basis of Martinez's motion for severance was that Zafiro's defense was antagonistic to his own. Zafiro testified that she was just a girl friend. Martinez stayed in her apartment from time to time, kept some clothes there, and gave her small amounts of money. But when he asked her whether he could store a suitcase in her closet he did not tell her that it contained narcotics and she had no idea it did. Martinez did not testify but his lawyer argued that Martinez had not known that cocaine was going to be delivered to Zafiro's apartment or that the suitcase in the closet contained cocaine; after all, it wasn't his apartment.

The government denies that the defenses of these various defendants were mutually antagonistic but concedes that if they were the defendants would be entitled to separate trials. The government describes this as a case merely of "finger-pointing," which it considers critically different from presenting mutually antagonistic defenses although as an original matter we might have thought that for codefendants to point the finger of guilt at each other was about as forthright a gesture of mutual antagonism as could be imagined. Rule 14 of the federal criminal rules allows severance if a defendant (or for that matter the government) would be "prejudiced" by a joint trial. There is nothing about mutual antagonism. There is nothing, either, to suggest that two defendants cannot be tried together if it is certain that one but not both committed the crime and the only uncertainty is which one—the government's idea of when mutually antagonistic defenses bar a joint trial.

True, a vast number of cases say that a defendant is entitled to a severance when the "defendants present

mutually antagonistic defenses" in the sense that "the acceptance of one party's defense precludes the acquittal of the other defendant," *United States v. Keck*, 773 F.2d 759, 765 (7th Cir. 1985) (though *United States v. McPartlin*, 595 F.2d 1321, 1334 (7th Cir. 1979), denies this proposition), but not when the defendants are engaged merely in "finger-pointing." *United States v. Buljubasic*, 808 F.2d 1260, 1263 (7th Cir. 1987); *United States v. Emond*, 935 F.2d 1511, 1514 (7th Cir. 1991). This formulation has become canonical. But we recall Justice Holmes's warning that to rest upon a formula is a slumber that prolonged means death. The fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid "the scandal and inequity of inconsistent verdicts." *Richardson v. Marsh*, 481 U.S. 200, 210 (1987). Cf. *United States v. Buljubasic*, *supra*, 808 F.2d at 1263. The analogy of interpleader comes to mind, Fed. R. Civ. P. 22; also such joint-tort cases as *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948), and *Sindell v. Abbot Laboratories*, 26 Cal. 3d 588, 607 P.2d 924 (1980). And as we said earlier we are not clear why the case in which the acceptance of one party's defense precludes the acquittal of the other defendant could not be regarded as a paradigmatic case of finger-pointing. We must dig beneath formulas.

As an original matter, persons charged in connection with the same crime should be tried separately only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants. Two situations might fit this bill. The first is that of a *complex* case with *many* defendants some of whom might be only *peripherally* involved in the alleged wrongdoing. The danger is that the bit players may not be able to differentiate themselves in the jurors' minds from the stars. Against that danger must be weighed the interest in trying all members of a conspiracy together so that the jury can get a complete picture and the government can save the expense of conducting multiple trials to break

a single ring. This counterweight has invariably prevailed in the appellate cases, e.g., *United States v. Diaz*, 876 F.2d 1344, 1357-59 (7th Cir. 1989); *United States v. Moya-Gomez*, 860 F.2d 706, 754 (7th Cir. 1988); *United States v. L'Allier*, 838 F.2d 234, 241-42 (7th Cir. 1988); *United States v. Percival*, 756 F.2d 600, 610 (7th Cir. 1985)—we can find no recent reversals on this ground in this circuit, and only a couple in others. *United States v. Engleman*, 648 F.2d 473, 480-81 (8th Cir. 1981); *United States v. Salomon*, 609 F.2d 1172, 1175-77 (5th Cir. 1980). Either appellate courts have faith that the jury will obey instructions to consider the evidence regarding each defendant separately, or they defer to the district judge's judgment that a severance is not required. (They might defer as much to the opposite judgment, but such cases are underrepresented in an appellate sample. When the district judge grants a severance and the defendants go on to trial and are either acquitted or convicted, there is no possibility of appeal—well, almost none. If the government appeals the dismissal of an indictment or some other order made appealable by 18 U.S.C. § 3731, it may be permitted to challenge a severance under the doctrine of pendent appellate jurisdiction. *United States v. Maker*, 751 F.2d 614, 626 (3d Cir. 1984), allowed the government to challenge several severances in such a case, though without mentioning the doctrine or insisting on that close relatedness between the pendent and the independently appealable order that is a central element of the doctrine. *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988).)

A severance is more likely to be granted, and rightly so, when the defendants are not alleged to be members of a single conspiracy but instead are more loosely related to one another, for then the economies of a joint trial are fewer. *United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir. 1985); *United States v. Castro*, 829 F.2d 1038, 1045-46 (11th Cir. 1987). Such cases are rare, however, because different offenders can be joined in a single indictment only "if they are alleged to have participated

in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). That will ordinarily require that they be charged, or chargeable, either as coconspirators or as aiders and abettors of a conspiracy. *United States v. Velasquez*, *supra*, 772 F.2d at 1353.

The second type of case in which a joint trial is likely to throw the jury off the scent is where exculpatory evidence essential to a defendant's case will be unavailable—or highly prejudicial evidence unavoidable—if he is tried with another defendant. For example, *Bruton v. United States*, 391 U.S. 123 (1968), holds that a limiting instruction is insufficient to dispel the prejudice to a codefendant of being inculpated in a defendant's confession, and in such a case either redaction (*Richardson v. Marsh*, *supra*) or severance may be necessary. And there are cases in which a person would refuse to testify for a codefendant in a joint trial for fear of incriminating himself, yet if tried separately and convicted might thereafter be willing to testify and might give testimony exculpating the other defendant. *Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1979) (per curiam). The danger of course is that all the codefendants will want to be tried last, producing impasse.

However that issue be resolved, mutual antagonism, finger-pointing, and other manifestations or characterizations of the effort of one defendant to shift the blame from himself to a codefendant neither control nor illuminate the question of severance. If it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted—and in either case there would be a miscarriage of justice. We can imagine, if barely, a situation in which all but one of the defendants try to place the blame on that one, so that he finds himself facing in effect a barrage of prosecutors—the official prosecutor and the other defendants' lawyers. Maybe a jury would be misled in such a case, and if the danger was substantial the district judge would be obliged to grant a severance. That is not this case. Each member of each

pair of defendants (Soto-Garcia and Martinez-Zafiro) was accusing the other of being the drug dealer. In this symmetrical situation, each defendant had to defend himself against the prosecutor and one other defendant but at the same time had a live body to offer the jury in lieu of himself (or herself). Soto could say, "Don't convict me, convict Garcia," and Garcia's lawyer could say, "Don't convict my client, convict Soto." This was apt to be a more persuasive line than telling the jury to let everyone go, when the one thing no one could question is that the government had found 75 pounds of cocaine on premises connected with these defendants. No defendant was placed at a *net* disadvantage by being paired with another defendant whom he could accuse and who could accuse him in turn, let alone so disadvantaged as to be unable to obtain a fair trial. Cf. *United States v. Madison*, 689 F.2d 1300, 1306 (7th Cir. 1982). And the benefit of the joint trial went beyond the avoidance of duplication. The jury was given the full picture, which it would not have had if the trial had been limited to two of the four alleged conspirators (one from each pair, since neither Soto nor Garcia complain of being tried with Martinez and Zafiro, and Martinez does not complain of being tried with Soto and Garcia). Joint trials, in this as in many other cases, reduce not only the direct costs of litigation, but also error costs.

We remind the defense bar that they are not obliged to make futile arguments on behalf of their clients. The argument that a conviction should be reversed because the district judge failed to sever properly joined defendants for trial is nearly always futile even when the defendants can be said to be presenting mutually antagonistic defenses.

We come to the second question, that of Zafiro's guilt. There was no direct evidence against her. The drugs were found in her apartment—as was she. If that were all the evidence, we would reverse her conviction with directions to acquit. Our system of criminal justice does not permit the conviction of a person for the crime of aiding and abetting, or for the crime of conspiracy, merely because he

is found on premises where illegal drugs are delivered or kept. *United States v. Atterson*, 926 F.2d 649, 656 (7th Cir. 1991). Suppose Martinez and Zafiro had been married, and, unbeknownst to his wife, Martinez stored narcotics in the house or received deliveries there, or both. Obviously with no knowledge of what was going on she could not be convicted of participating in a drug-dealing conspiracy with him. Nor could she be convicted of aiding and abetting her husband's drug dealing. The crime of aiding and abetting requires *knowledge* of the illegal activity that is being aided and abetted, a *desire* to help the activity succeed, and some *act* of helping. *United States v. Pino-Perez*, 870 F.2d 1230, 1235 (7th Cir. 1989) (en banc); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.). In our hypothetical case not one of the three elements would be present. If the wife did know what was going on but did nothing to help her husband, the second and third elements would be missing and again she would have to be acquitted. Whether she could be convicted of conspiracy would depend on whether she could be found to have agreed to participate in her husband's illegal activity; again, mere knowledge of that activity would not be enough. *United States v. Williams*, 798 F.2d 1024, 1028-30 (7th Cir. 1986).

Does it make a difference if, as here, the wife is not a wife but a girl friend and she lives in her own apartment, not her boyfriend's apartment or an apartment owned or leased jointly by them? It does. If the boyfriend is using her apartment in his drug dealings, then by providing the apartment for his use (whether or not she understands the nature of the use) she is helping his illegal activity, and the third element is satisfied; whereas a wife who merely does not prevent her husband from using their home for illegal purposes does not help his illegal activity in the relevant sense. But the girl friend's knowledge or lack thereof—the first element required for aiding and abetting—remains crucial. If she does not know what use her boyfriend is making of her apartment—if Zafiro did not know what was in the suitcase and did not know that Soto and Garcia were bringing a load of drugs to the apartment when the arrests took place—she is guilty neither of aiding and abetting nor of conspiracy.

To be proved guilty of aiding and abetting, still another element must be established: that the defendant desired the illegal activity to succeed. The purpose of this requirement is a little mysterious but we think it is to identify, and confine punishment to, those forms of assistance the prevention of which makes it more difficult to carry on the illegal activity assisted. A clerk in a clothing store who sells a dress to a prostitute knowing that she will be using it in plying her trade is not guilty of aiding and abetting. *United States v. Giovannetti*, 919 F.2d 1223, 1227 (7th Cir. 1990); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 747 (3d ed. 1982). The sale makes no difference to her illegal activity. If the clerk didn't make the sale, she would buy, at some trivial added expense in time or money, an equivalent outfit from someone ignorant of her trade. That is where the requirement of proving the defendant's desire to make the illegal activity succeed cuts off liability. The boost to prostitution brought about by selling a prostitute a dress is too trivial to support an inference that the clerk actually *wants* to help the prostitute succeed in her illegal activity. If on the other hand he knowingly provides essential assistance, we can infer that he does want her to succeed, for that is the natural consequence of his deliberate act. It might be better in evaluating charges of aiding and abetting to jettison talk of desire and focus on the real concern, which is the relative dangerousness of different types of assistance, but that is an issue for another day.

In the case of conspiracy the additional element required for guilt is not desire for success, which can be assumed from proof that the defendant joined the conspiracy, but, precisely, the agreement. That element is not supplied by mere knowledge of an illegal activity either, let alone by mere association with other conspirators or mere presence at the scene of the conspiratorial deeds. *United States v. Williams*, *supra*; *United States v. Atterson*, *supra*.

So if all the government had in the way of evidence against Zafiro is that she and the drugs were both found in the apartment at the time of the arrest of her boyfriend and his two associates, a reasonable jury could not convict her of either conspiracy or aiding and abetting any more than it could have convicted the girl friend whose car was found to contain illegal drugs and who was not even charged (granted, she apparently had never used the car). Guilt by association is not a permissible theory of criminal liability even in the war against drugs. But there is more in this case. A qualified expert witness—an experienced drug enforcement officer—testified that drug dealers do not discuss or deliver large quantities of illegal drugs in the presence of innocent bystanders. When arrested, Zafiro was in the living room of her apartment with Martinez awaiting the delivery by Soto and Garcia of 55 pounds of cocaine, no doubt to be stashed in the apartment until sold. And in Zafiro's closet was a suitcase full of cocaine. It is unlikely that a girl friend would be allowed to think that a suitcase with many thousands of dollars worth of cocaine actually contained a load of flea powder or that a heavy box of cocaine really was full of kitty litter. The witness's testimony about the methods of drug dealers may have been untrue, but Zafiro's counsel presented no testimony to the contrary. And if Zafiro knew that her apartment was being used as a stash house, she was knowingly rendering material assistance to her codefendants and desired that their malefaction succeed.

Zafiro took the stand to defend herself. She denied knowing anything about Martinez's drug dealings. Obviously the jury disbelieved her denials. The government cannot force a defendant to take the stand, of course, but if he does and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence. *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.). Concern has been expressed recently that "if negative inferences, based on demeanor evidence, were adequate in themselves to satisfy a rational juror of guilt beyond a reasonable doubt, appellate courts might

not be able to provide meaningful review of the sufficiency of evidence." *United States v. Jenkins*, 928 F.2d 1175, 1179 (D.C. Cir. 1991). Judge Hand had expressed the same concern in *Dyer v. MacDougall*, *supra*, 201 F.2d at 169. Such cases are unlikely to occur, however, for if there is no evidence of guilt other than what the defendant might supply by offering protestations of innocence that the jury disbelieved, he would have no reason to take the stand; he would be entitled to a directed acquittal at the close of the government's case. Zafiro's lawyer did move for directed acquittal then, but he does not cite the denial of that motion as error. We therefore need not decide whether, if Zafiro had not taken the stand, the testimony of the expert witness would have been enough to tip the scales of justice to guilt, given the heavy burden of proof that the government bears in criminal cases. That issue is moot. She testified, and on the basis of her demeanor and the expert testimony the jury was entitled to conclude that she knew what was in the suitcase and what was coming in the box. If she knew those things she knew that by providing her apartment for the storage of these containers she was aiding a drug conspiracy involving Martinez. No more was necessary to make her an aider and abettor of that conspiracy. Cf. *United States v. Percival*, 756 F.2d 600, 610-11 (7th Cir. 1985).

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—9-26-91—500

United States District Court

NORTHERN District of ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA

V.

SALVADOR GARCIA

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 89 CR 165-4

Joseph Sib Abraham
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) one and five after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC 846	Conspiracy to possess with intent to distribute cocaine, heroin, and marijuana	1
21 USC 841(a)(1)	Possession with intent to distribute cocaine	5

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 100.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
546-90-1475

November 28, 1989
Date of Imposition of Sentence

Defendant's mailing address:
Metropolitan Correctional Center
Chicago, IL

Signature of Judicial Officer

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

Defendant's residence address:
2604 Sea Breeze
El Paso, TX 77936

November 28, 1989
Date

Appendix "A" 2

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS.

IT IS FURTHER ORDERED that defendant be given credit for time already served.

☒ The Court makes the following recommendations to the Bureau of Prisons: That defendant be incarcerated at Oxford, Wisconsin.

☐ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,
  ☐ at _____ a.m. / p.m. on _____.
  ☐ as notified by the Marshal.
☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
  ☐ before 2 p.m. on _____.
  ☐ as notified by the United States Marshal.
  ☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: SALVADOR GARCIA
Case Number: 89 CR 165-4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of
FIVE (5) YEARS

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

United States District Court

NORTHERN District of ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
V.
ALFONSO SOTO
(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 89 CR 165-3

Kenneth L. Cunniff
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) one, five and six after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC 846	Conspiracy	1
21 USC 841(a)(1)	Possession with intent to distribute Cocaine	5 and 6

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 150.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
319-64-7721

Defendant's mailing address:
3517 West 38th Street
Chicago, IL

Defendant's residence address:
Metropolitan Correctional Center
Chicago, IL 60605

December 14, 1989
Date of Imposition of Sentence

Signature of Judicial Officer

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

December 14, 1989
Date

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Appendix "B"

Defendant: ALFONSO SOTO
Case Number: 89 CR 165-3

Judgment—Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS.

IT IS ORDERED that the defendant to be given credit for time already served.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Judgment—Page 3 of 4

Defendant: ALFONSO SOTO
Case Number: 89 CR 165-3

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

United States District Court

NORTHERN District of ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA

V.

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

GLORIA ZAFIRO

Case Number 89 CR 165-1

(Name of Defendant)

THOMAS J. ROYCE
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) One (1) and acquitted as to counts 2,3 & 4 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC 846	Conspiracy to possess with intent to distribute cocaine, heroin and marijuana	1

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) Two (2), Three (3), and Four (4), and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
354-50-4133

November 16, 1989
Date of Imposition of Sentence

Defendant's mailing address:
Chgo. Metropolitan Correctional Center
71 West Van Buren
Chicago, IL 60605

Signature of Judicial Officer

NICHOLAS J. BUA, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

Defendant's residence address:

November 16, 1989
Date

NOV 20 1989

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Appendix "C"

Defendant: GLORIA ZAFIRO
Case Number: 89 CR 165-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE-HUNDRED-FIFTY-ONE (151) MONTHS.

This term consists of terms of ONE-HUNDRED-FIFTY-ONE (151) MONTHS on Counts One, with credit for time served from February 22, 1989.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: GLORIA ZAFIRO
Case Number: 89 CR 165-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: GLORIA ZAFIRO
Case Number: 89 CR 165-1

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 50.00, consisting of a fine of $ -0- and a special assessment of $ 50.00.

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

A $50.00 special assessment as to the one (1) count convicted, for a TOTAL of $50.00.

This sum shall be paid ☒ immediately.
☐ as follows:

☒ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☒ The interest requirement is waived.
☐ The interest requirement is modified as follows:

United States District Court

NORTHERN District of ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA

V.

JOSE MARTINEZ

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 89 CR 165-2

(Name of Defendant)

Steven Decker
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) one, two, three, and four after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC 846	Conspiracy	1
21 USC 841(a)(1)	Possession with intent to distribute controlled substances	2,3,4

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 200.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
526-33-6127

November 21, 1989
Date of Imposition of Sentence

Defendant's mailing address:
Metropolitan Correctional Center
Chicago, Illinois

Signature of Judicial Officer

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

Defendant's residence address:
3102 East Avenue
Berwyn, Illinois

November 21, 1989
Date

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Appendix "D"

Defendant: JOSE MARTINEZ
Case Number: 89 CR 165-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED SIXTY-TWO (262) MONTHS.

It is further ordered that defendant be given credit for time already served.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: JOSE MARTINEZ
Case Number: 89 CR 165-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

No. 91-6824

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GLORIA ZAFIRO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KRISTINA L. AMENT
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GLORIA ZAFIRO, ET AL. PETITIONERS	)	
V	)	NO. 91-6824
UNITED STATES OF AMERICA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES by mail on February 26, 1992.

THOMAS M. BREEN
221 N. LASALLE STREET
SUITE 2100
CHICAGO, IL 60601

CHARLES ROBERTS
123 MILLS STREET
SUITE 306
EL PASO, TX 79901

STEVEN R. DECKER
221 N. LASALLE STREET
SUITE 1164
CHICAGO, IL 60601

KENNETH L. CUNNIFF
20 S. CLARK STREET
SUITE 800
CHICAGO, IL 60603

KENNETH W. STARR
Solicitor General

February 26, 1992

QUESTION PRESENTED

Whether criminal defendants are entitled to separate trials because they present antagonistic defenses.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-6824

GLORIA ZAFIRO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A11, is reported at 945 F.2d 881.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1991. The petition for a writ of certiorari was filed on December 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of various narcotics offenses. All four petitioners were convicted of conspiring to possess cocaine, heroin, and marijuana with the intent to distribute it, in violation of 21 U.S.C. 846. In addition, petitioners Garcia and Soto were each convicted of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and petitioner Martinez was convicted of possessing cocaine, marijuana, and heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Garcia, Soto, and Zafiro were each sentenced to 151 months in prison, to be followed by five years of supervised release.[1] Martinez was sentenced to 262 months in prison, to be followed by five years of supervised release. Gov't C.A. Br. 3-4. The court of appeals affirmed. Pet. App. A1-A11.

1. Garcia, Soto, and Martinez were friends. Zafiro was Martinez's girlfriend. The evidence at petitioners' joint trial established that petitioners distributed illegal narcotics from Zafiro's apartment in Cicero, Illinois, and Soto's bungalow in Chicago, Illinois. On February 22, 1989, government agents followed Soto and Garcia as they transported a large, heavy box in Soto's Buick from his garage to Zafiro's apartment. A government agent followed Soto and Garcia up the stairs of Zafiro's building. After the agent identified himself, Soto and Garcia dropped the box and ran into Zafiro's apartment. Agents quickly followed, finding all four petitioners in the living room of the apartment. Pet. App. A2; Gov't C.A. Br. 7-9.

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[1] The jury acquitted Zafiro of possession with intent to distribute controlled substances. Pet. App. A1.

The box that Soto and Garcia were carrying contained 55 pounds of cocaine. After obtaining a search warrant, agents found in Zafiro's bedroom closet a suitcase containing approximately 25 grams of heroin, 16 pounds of cocaine, and four pounds of marijuana. During a consensual search of a Ford Probe in Soto's garage, agents found approximately eight additional pounds of cocaine. The Ford Probe was registered to Maria Vera, another girlfriend of Martinez; he had bought the car for her but she had never used it. Pet. App. A2; Gov't C.A. Br. 9-11.

2. Pursuant to Fed. R. Crim. P. 14,* Garcia and Soto moved for severance of their trials on the ground that they intended to assert mutually antagonistic defenses. The district court denied their motions. Pet. App. A2; Gov't C.A. Br. 3. At trial, Soto testified that he knew nothing about the drug conspiracy. Rather, he claimed that Garcia had come to stay with him and had used the Buick and the Ford Probe. Soto further testified he had given Garcia an empty box at the latter's request and that he did not know that Garcia had placed the box in the trunk of the Buick until they arrived at Zafiro's apartment. Soto also stated that he did not know what was inside the box until it was opened after their arrest. Although Garcia did not testify, his theory of defense, as

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* Rule 14, Fed. R. Crim. P., provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

presented by his lawyer during closing argument, was that the box belonged to Soto and that Garcia knew nothing about it. Pet. App. A3; Gov't C.A. Br. 13-14, 16-17.

Martinez unsuccessfully moved for a severance on the ground that Zafiro's defense was antagonistic to his own. Zafiro testified that Martinez stayed in her apartment from time to time but did not live there. She also testified that she did not know what was in the suitcase that was found in her bedroom closet. She stated that Martinez had brought the suitcase to her apartment two days before petitioners were arrested and that he did not tell her what was in the suitcase. Although Martinez did not testify, his lawyer argued that he did not know that any cocaine was going to be delivered to Zafiro's apartment or that the suitcase in Zafiro's closet contained drugs. Pet. App. A3; Gov't C.A. Br. 12-13, 22-24.

At the conclusion of the trial, the district court instructed the jury:

> Where two or more persons are charged with the commission of a crime, the guilt of one defendant may be established without proof that each of the defendants performed every act constituting the crime charged. However, you must give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence which may be applicable to him or to her.

8/15/89 Tr. 865.

3. The court of appeals affirmed, holding that the district court did not err by denying a severance to each of the defendants. Pet. App. A1-A11. The court noted that many cases have stated that

a defendant is entitled to a severance when the defendants present "mutually antagonistic defenses" such that the acceptance of one party's defense would lead the jury to conclude that the other party is guilty. Pet. App. A3-A4. The court refused to adopt that standard. It explained that "[t]he fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid the 'scandal and inequity of inconsistent verdicts.'" Id. at A4 (quoting Richardson v. Marsh, 481 U.S. 200, 210 (1987)). The court concluded that "persons charged in connection with the same crime should be tried separately only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants." Ibid.[1] That issue, the court reasoned, should rarely be determined by reference to the existence of mutually antagonistic defenses; rather, "[i]f it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted -- and in either case there would be a miscarriage of justice." Id. at A6.

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[1] The court offered two examples of such a case. First, in "a complex case with many defendants some of whom might be only peripherally involved in the wrongdoing," severance may be required because "the bit players may not be able to differentiate themselves in the jurors' minds from the stars." Pet. App. A4. Second, severance may be warranted "where exculpatory evidence essential to a defendant's case will be unavailable -- or highly prejudicial evidence unavoidable -- if he is tried with another defendant." Id. at A6.

The court of appeals found no basis for concluding that a joint trial would prevent a reliable jury verdict in this case:

> Each member of each pair of defendants (Soto-Garcia and Martinez-Zafiro) was accusing the other of being a drug dealer. In this symmetrical situation, each defendant had to defend himself against the prosecutor and one other defendant but at the same time had a live body to offer the jury in lieu of himself (or herself). Soto could say, "Don't convict me, convict Garcia," and Garcia's lawyer could say, "Don't convict my client, convict Soto." This was apt to be a more persuasive line than telling the jury to let everyone go, when the one thing no one could question was that the government had found 75 pounds of cocaine on premises connected with these defendants. No defendant was placed at a net disadvantage by being paired with another defendant whom he could accuse and who could accuse him in turn, let alone so disadvantaged as to be unable to obtain a fair trial.

Pet. App. A6-A7. A joint trial, the court explained, offered the jury "the full picture," making it both less costly and less prone to error than separate trials would have been. Id. at A7.

ARGUMENT

Petitioners contend that the district court erred by failing to sever their trials based on the antagonistic defenses they presented at trial and that the decision of the court of appeals affirming their convictions conflicts with the decisions of other courts of appeals.[2] Pet. 3-12. We believe that the court of appeals properly rejected petitioners' claim. Because the decision of the court of appeals, however, conflicts with the decisions of other courts of appeals concerning a question of importance to the

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[2] Zafiro did not preserve the severance issue in the courts below. Therefore, she cannot raise the issue here. See United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977); Addickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Each of the other petitioners, however, properly preserved the issue below.

federal criminal justice system, we do not oppose the petition for a writ of certiorari.

1. The courts of appeals have consistently recognized that persons who are indicted together generally should have their guilt adjudicated at a joint trial.[5] See, e.g., United States v. Warner, No. 90-3753 (6th Cir. Jan. 31, 1992), slip op. 10-11; United States v. Tootick, No. 90-30140 (9th Cir. Dec. 17, 1991), slip op. 16289; United States v. Romanello, 726 F.2d 173, 175 (5th Cir. 1984). Rule 14, Fed. R. Crim. P., however, authorizes district courts to sever the trial if a joint trial will unfairly prejudice the defendant. The courts of appeals review determinations concerning severance for abuse of discretion. See, e.g., Tootick, slip op. 16289; Romanello, 726 F.2d at 177; United States v. Davis, 623 F.2d 188, 194 (1st Cir. 1980).

Unlike the court in this case, other courts of appeals have held that severance is required when defendants present squarely antagonistic defenses. Thus, the Fifth Circuit has held that a defendant may "compel severance" when the defenses at trial are "antagonistic to the point of being irreconcilable and mutually exclusive." Romanello, 726 F.2d at 177; see also United States v. Crawford, 581 F.2d 489, 492 (5th Cir. 1978). The Tenth Circuit has likewise required a severance when the defendants' defenses are "mutually exclusive," so that the acceptance of the defense of one

[5] Rule 8(b), Fed. R. Crim. P., provides that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

defendant would "tend to preclude the acquittal of [the other]." United States v. Peveto, 881 F.2d 884, 858 (10th Cir. 1989); United States v. Smith, 788 F.2d 663, 668 (10th Cir. 1986). And the Eleventh Circuit has followed a similar rule. In United States v. Rucker, 915 F.2d 1511 (11th Cir. 1990), the court held that a new trial is required if two defendants' stories are mutually exclusive and irreconcilable so that the "juxtaposition of the co-defendants' protestations of innocence would make each defendant 'the government's best witness against the other.'" Id. at 1513 (quoting Crawford, 581 F.2d at 492).

In holding that mutually exclusive defenses do not require severance, the Seventh Circuit in this case brought itself into conflict with the decisions of the Fifth, Tenth, and Eleventh Circuits.[6] Under the principles applied in those decisions, petitioners would have been entitled to severance because of their mutually exclusive and irreconcilable defenses. Soto and Garcia were caught transporting a large cardboard box containing 55 pounds of cocaine. Each defendant claimed that he had no knowledge of the

[6] Other courts have adopted varying formulations of the rule requiring a severance when defendants take positions at odds with those of their co-defendants. In some circuits, conflicting defenses will require severance when the conflict is so prejudicial that the differences are irreconcilable, and the jury will unjustifiably infer that the conflict itself indicates the guilt of both defendants. See, e.g., United States v. Clark, 928 F.2d 639, 644 (4th Cir. 1991); Davis, 623 F.2d at 194-195; United States v. Haldeman, 559 F.2d 31, 71 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). In addition, the Ninth Circuit recently rejected a per se rule requiring severance whenever co-defendants present mutually exclusive defenses; rather, the court concluded that the need for severance must be evaluated by reference to whether the jury is able "to assess the guilt or innocence of each defendant on an individual and independent basis." Tootick, slip op. 16292.

contents of the box because it belonged to the other defendant. No reasonable juror could have believed that neither of the defendants had dominion and control over the large box of cocaine that both of them were driving across town; hence, the core of each defendant's defense implicated the other in the crime. The same is so with respect to Martinez and Zafiro. If Martinez had stored the suitcase with Zafiro, and Zafiro did not know that it contained 20 pounds of cocaine, that would have tended to preclude Martinez from being acquitted on the theory presented by his lawyer -- that Martinez was unaware of the contents of a suitcase found in someone else's apartment. If, on the other hand, the jury believed Martinez's account, Zafiro's defense would have collapsed.

The conflict among the circuits on this issue is one that warrants resolution by this Court. It is not uncommon in multi-defendant cases for defendants to assert antagonistic defenses. Where it is clear that a crime has been committed and there are only a limited number of likely perpetrators, finger-pointing among the defendants is almost inevitable. What is more, a rule that antagonistic defenses require a severance is likely to provoke pretrial claims of antagonism where defendants have an incentive to seek a severance, but where it is far from clear that the defenses will in fact turn out to be antagonistic. For both reasons, the issue presented in this case arises frequently in federal criminal cases and is an appropriate one for this Court's review.

2. We submit the court of appeals adopted the correct approach to questions of severance under Rule 14 where there are

mutually exclusive and irreconcilable defenses, and that it properly affirmed petitioners' convictions under that approach.

a. As this Court has recognized, "[j]oint trials play a vital role in the criminal justice system." Richardson v. Marsh, 481 U.S. 200, 209 (1986).[1] They promote "the efficiency and the fairness of the criminal justice system" by avoiding separate prosecutions "presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." Id. at 210. In addition, joint trials "generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability -- advantages which sometimes operate to the defendant's benefit." Ibid.

The court of appeals properly took those considerations into account when it ruled that, in general, a joint trial presenting mutually exclusive defenses will not require severance under Rule 14. The Seventh Circuit's rule reduces "not only the direct costs of litigation, but also error costs." Pet. App. A7. First, joint trials in such cases allow the jury to assess accurately the relative culpability of the co-defendants; in this case, "[t]he jury was given the full picture, which it would not have had if the

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[1] The Court in Richardson v. Marsh held that the introduction of a co-defendant's confession at a joint trial does not violate the Confrontation Clause, U.S. Const., Amdt. VI, if the confession on its face does not implicate the defendant. 481 U.S. at 208.

trial had been limited to two of the four alleged conspirators." Ibid. Second, a joint trial will help avoid the risk of inconsistent verdicts. Id. at A3. As the court of appeals observed:

> If it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted -- and in either case there would be a miscarriage of justice.

Id. at A6.

The court did not foreclose the possibility that severance will be required in some cases in which mutually antagonistic defenses, coupled with other case-specific factors, would affect the jury's ability to render a reliable verdict concerning one or more of the co-defendants. The court cited several examples: (1) a complex conspiracy trial with many co-defendants, if defendants whose involvement was peripheral would be unable to differentiate themselves from the central players, Pet. App. A4; (2) a trial in which "exculpatory evidence essential to a defendant's case will be unavailable -- or highly prejudicial evidence unavoidable -- if [one defendant] is tried with another," id. at A6; or (3) the unlikely case in which all but one of the defendants attempt to place the blame onto one co-defendant, ibid. Those examples, however, follow not from any special rule with respect to antagonistic defenses, but from the general principle under Rule 14 that a court must grant a severance whenever it appears that a joint trial will unfairly prejudice one or more of the defendants. The Seventh Circuit's position, which we endorse, is simply that there should be no flat rule, or even a presumption, requiring a

severance whenever defendants assert antagonistic or mutually exclusive defenses. Because the Seventh Circuit's analysis is at odds with that of several other courts of appeals on an issue of importance to the federal criminal justice system, we do not oppose the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1992

No. 91-6824

In The

Supreme Court of the United States

October Term, 1991

GLORIA ZAFIRO, et al.,

Petitioners,

vs.

UNITED STATES

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed December 23, 1991
Certiorari Granted March 23, 1992

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RELEVANT DOCKET ENTRIES

United States v. Gloria Zafiro 89 CR 165-01

02/23/89	1	Filed magistrate complaint
	2	Bail not allowed
	3	Filed affidavit
02/28/89	13	Order finding of probable cause
	13	Defendant held to the district court
03/21/89	31	Filed indictment
	32	Bail not allowed
03/28/89	35	Defendant enters plea of not guilty (Counts 1-4)
04/25/89	47	Motion to quash filed
	47	Motion to suppress evidence filed
05/05/89	55	Government's consolidated response to defendants' pretrial motions.
07/11/89	66	Motion to suppress evidence denied
	66	Order filed (Government is ordered to instruct its agents to preserve notes.)
	66	Motion to quash denied
07/12/89	67	Order filed (Government is ordered not to destroy the contraband seized in this case until after the trial has been completed.)
07/13/89	68	Order filed (D.E.A. is ordered to preserve all drug evidence and contraband.)
08/04/89	78	Enter Report and Recommendation of Magistrate Bucklo regarding defendants'

various motions to quash their arrests, to quash search warrant executed by the government in this matter, and to suppress evidence seized by the government following defendants' arrests. All matters relating to the referral of this action having been resolved, this case is returned to the assigned Judge for further proceedings.

08/07/89	83	Motion made in open court in limine (MOT#21) (Counts 1-4) (JUDGE BUA)
	83	Order filed (Defendant's motion in limine is entered and continued for the reasons stated in open court.)
	86	Motion made in open court to dismiss
	86	Motion to dismiss denied
	86	Motion made in open court for mistrial
	86	Motion for mistrial granted.
08/16/89	98	Jury verdict of not guilty (Counts 2-4)
	98	Jury verdict of guilty (Count 1)
	98	Court judgment of guilty (Count 1) (Court enters judgment of acquittal to counts 2, 3 and 4.)
11/16/89	120	Sentencing of defendant (Count 1) (The defendant has been found not guilty on counts Two (2), Three (3), and Four (4), and is discharged as to such counts. It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately. The defendant is hereby committed to the custody of the United States Bureau

of Prisons to be imprisoned for a term of ONE-HUNDRED-FIFTY-ONE (151) MONTHS on Count One, with credit for time served from February 22, 1989. The defendant is remanded to the custody of the United States Marshal. Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.)

11/17/89	121	Filed notice of appeal (From final judgment entered November 16, 1989.)
	123	Jurisdictional Statement.
12/07/89	140	Motion for appointment of counsel filed (To appoint trial counsel as counsel on appeal. Notice of motion attached.)
	141	Motion for appointment of counsel granted (MOT#34) (Thomas J. Royce is appointed as attorney on appeal. Defendant is given leave to proceed on appeal in forma pauperis.)
	141	Order appointing attorney ROYCE, THOMAS J to represent defendant.
10/18/91	179	Filed certified copy of order from U.S. Court of Appeals affirming judgment of U.S. District Court
	180	Filed opinion of USCA
04/03/92	182	Filed copy of order granting leave to proceed in forma pauperis and the petition for writ of certiorari in the above-entitled case.

United States v. Jose Martinez 89 CR 165-02

02/23/89	1	Filed magistrate complaint.
02/28/89	14	Order finding of probable cause (MAGISTRATE JUDGE BUCKLO)
	14	Defendant held to the district court (FOR FURTHER PROCEEDINGS) (MAGISTRATE JUDGE BUCKLO)
	14	Bail not allowed
03/21/89	31	Filed indictment
	32	Bail not allowed (No bond set, detained by Magistrate.)
04/04/89	38	Defendant enters plea of not guilty (Counts 1,2-4) (JUDGE BUA)
04/25/89	47	Motion to quash filed.
	47	Motion to suppress evidence filed.
04/28/89	51	Motion to quash filed (Search warrant.)
	52	Motion to suppress evidence filed (Counts 1,2-4)
	54	Motion for joinder filed (Counts 1,2-4) (To adopt motions of co-defendants.)
05/05/89	55	Government's consolidated response to defendants' pretrial motions.
07/11/89	66	Motion for joinder granted (JUDGE BUA)
	66	Motion to suppress evidence denied.
	66	Order filed (Government is ordered to instruct its agents to preserve notes.)
	66	Motion to quash denied

	66	Motion to quash denied (To quash search warrant.)
	66	Motion to quash denied (To quash arrest.)
	66	Motion to suppress evidence denied (Illegally seized evidence.)
	66	Motion for discovery/inspection denied (Of all statements which the government will seek to attribute to defendant.)
07/12/89	67	Order filed (Government is ordered not to destroy the contraband seized in this case until after the trial has been completed.)
07/13/89	68	Order filed (D.E.A. is ordered to preserve all drug evidence and contraband.)
08/04/89	80	Motion for severance/separate trial filed (Counts 1,2-4) (Or in the alternative request for separate jury trial.)
08/07/89	83	Motion for severance/separate trial denied (Or for a separate jury trial.)
	83	Motion made in open court (pre-trial motion) (Counts 1,2-4) (To bar jury during testimony of defendant Zafiro.) (JUDGE BUA)
	83	Motion (pre-trial motion) mooted (To bar jury during testimony of defendant Zafiro.) (JUDGE BUA)
	83	Order filed (Defendant's motion in limine is entered and continued for the reasons stated in open court.)
	86	Motion made in open court to dismiss

	86	Motion to dismiss denied (JUDGE BUA)
	86	Motion made in open court for mistrial (Counts 1,2-4)
	86	Motion for mistrial granted (Jury impanelment begins. Jury trial held and adjourned to August 8, 1989 at 10:00 a.m.)
08/16/89	99	Jury verdict of guilty (Counts 1,2-4)
	99	Court judgment of guilty (Counts 1,2-4)
09/18/89	111	Order filed (Defendant's motion for a new trial is denied.)
11/21/89	125	Sentencing of defendant (Counts 1-4) (It is ordered that the defendant shall pay to the United States a special assessment of $200.00, which shall be due immediately. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED SIXTY-TWO (262) MONTHS. It is further ordered that defendant be given credit for time already served. Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.) (JUDGE BUA) (Dkt'd 11/22/89).
11/30/89	131	Motion to appeal in forma pauperis filed
	132	Motion to appeal in forma pauperis granted
	133	Filed notice of appeal (Counts 1-4)
	134	Filed letter re. jurisdictional statements.

12/05/89	136	Notice of appeal and docket entries transmitted to USCA (APPL#2) (Dkt'd 12/05/89).
10/18/91	180	Filed opinion of USCA (89-3639)
04/03/92	182	Filed copy of order granting leave to proceed in forma pauperis and the petition for writ of certiorari in the above-entitled case.

United States v. Alfonso Soto 89 CR 165-03

02/23/89	1	Filed magistrate complaint
03/02/89	24	Detention hearing held (MAGISTRATE JUDGE BUCKLO)
	24	Preliminary examination held
	24	Order finding of probable cause
	24	Defendant held to the district court
	24	Bail not allowed
03/21/89	31	Filed indictment
	32	Bail not allowed (No bond set, detained by Magistrate.)
04/04/89	38	Defendant enters plea of not guilty (Counts 1,5-6)
04/25/89	45	Motion for severance/separate trial filed (Counts 1,5-6) (Motion to sever defendant Soto from defendant Garcia.
	47	Motion to quash filed
	47	Motion to suppress evidence filed

04/27/89	49	Motion for joinder filed (MOT#5) (To adopt pretrial motions of codefendants.)
05/05/89	55	Government's consolidated response to defendants' pretrial motions.
05/15/89	62	Request for an evidentiary hearing and reply to government's response to defendants' pretrial motion to suppress physical evidence acquired at 3517 W. 38th Street.
	62	(Supplement to the previously filed motion to suppress physical evidence and request for an evidentiary hearing.)
	62	Reply to government's responses to defendant's pretrial motions to suppress physical evidence and request for an evidentiary hearing.
07/11/89	66	Motion for joinder granted
	66	Motion to suppress evidence denied
	66	Order filed (Government is ordered to instruct its agents to preserve notes.)
	66	Motion to quash denied
	66	Motion for severance/separate trial denied
	66	Motion for discovery/inspection denied
08/04/89	78	Order filed (For Judge Bua. Enter Report and Recommendation of Magistrate Bucklo regarding defendants' various motions to quash their arrests, to quash search warrant executed by the government in this matter, and to suppress evidence seized by the government

		following defendants' arrests. All matters relating to the referral of this action having been resolved, this case is returned to the assigned Judge for further proceedings.
08/07/89	86	Motion made in open court to dismiss
	86	Motion to dismiss denied
	86	Motion made in open court for mistrial
	86	Motion for mistrial granted
08/16/89	100	Jury verdict of guilty
	100	Court judgment of guilty (Counts 1,5-6)
09/15/89	105	Motion for new trial filed (Counts 1,5-6)
	105	Filed memorandum in support of motion for new trial
09/18/89	110	Motion for new trial denied
10/25/89	115	Motion to produce filed (Counts 1,5-6) (For production of Brady Material.)
	116	Motion for judgment of acquittal filed (Counts 1,5-6)
	117	Motion to appeal in forma pauperis filed
11/30/89	130	Filed appearance of CUNNIFF, KENNETH L as attorney for defendant
		Attorney CUNNIFF, KENNETH L added to case
12/14/89	143	Motion to appeal in forma pauperis granted
	145	Sentencing of defendant (Counts 1,5-6) (It is ordered that the defendant shall

		pay to the United States a special assessment of $150.00, which shall be due immediately. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS. IT IS ORDERED that the defendant to be given credit for time already served. Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.) (JUDGE BUA)
12/15/89	146	Filed notice of appeal (Counts 1,5-6) (From final judgment dated December 14, 1989.)
	147	Jurisdictional Statement.
	179	Filed certified copy of order from U.S. Court of Appeals affirming judgment of U.S. District Court
	180	Filed opinion of USCA
12/12/91	181	Affidavit of Alfonso Soto with letters dated 11/5/91 and 12 4, 1991 attached.
04/03/92	182	Filed copy of order granting leave to proceed in forma pauperis and the petition for writ of certiorari in the above-entitled case.

United States v. Salvador Garcia 89 CR 165-04

02/23/89	1	Filed magistrate complaint
	25	Detention hearing held

	25	Order finding of probable cause
	25	Defendant held to the district court
	25	Bail not allowed
03/21/89	31	Filed indictment
	32	Bail not allowed
04/25/89	47	Motion to suppress evidence filed
	48	Motion to suppress evidence filed
04/27/89	49	Motion for joinder filed (Counts 1,5) (To adopt pretrial motions of codefendants.)
05/05/89	55	Government's consolidated response to defendants' pretrial motions.
05/15/89	62	Request for an evidentiary hearing and reply to government's response to defendants' pretrial motion to suppress physical evidence acquired at 3517 W. 38th Street.
	62	(Supplement to the previously filed motion to suppress physical evidence and request for an evidentiary hearing.)
	62	Reply to government's responses to defendant's pretrial motions to suppress physical evidence and request for an evidentiary hearing.
07/11/89	66	Motion for joinder granted (JUDGE BUA)
	66	Motion to suppress evidence denied
	66	Order filed (Government is ordered to instruct its agents to preserve notes.)
	66	Motion to quash denied

	66	Motion for discovery/inspection denied
07/12/89	67	Order filed (Government is ordered not to destroy the contraband seized in this case until after the trial has been completed.)
07/13/89	68	Order filed (D.E.A. is ordered to preserve all drug evidence and contraband.)
08/04/89	78	Enter Report and Recommendation of Magistrate Bucklo regarding defendants' various motions to quash their arrests, to quash search warrant executed by the government in this matter, and to suppress evidence seized by the government following defendants' arrests. All matters relating to the referral of this action having been resolved, this case is returned to the assigned Judge for further proceedings.
08/07/89	86	Motion made in open court to dismiss
	86	Motion to dismiss denied
	86	Motion made in open court for mistrial
	86	Motion for mistrial granted
08/16/89	101	Court judgment of guilty (Counts 1, 5)
11/28/89	128	Sentencing of defendant (Counts 1,5) (It is ordered that the defendant shall pay to the United States a special assessment of $100.00, which shall be due immediately. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS. IT IS FURTHER ORDERED that defendant be given

		credit for time already served. The Court makes the following recommendations to the Bureau of Prisons: that defendant be incarcerated at Oxford, Wisconsin. Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.) (JUDGE BUA)
12/06/89	138	Filed notice of appeal (Counts 1,5) (From final judgment dated November 28, 1989.)
12/07/89		Mailed letter re. jurisdictional statement.
10/18/91	179	Filed certified copy of order from U.S. Court of Appeals affirming judgment of U.S. District Court
	180	Filed opinion of USCA
04/03/92	182	Filed copy of order granting leave to proceed in forma pauperis and the petition for writ of certiorari in the above-entitled case.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	No. 89 CR 165
v.	)	Violations: Title 21,
GLORIA ZAFIRO,	)	United States Code,
JOSE MARTINEZ,	)	Sections 841(a)(1) and 846
ALFONSO SOTO and	)	
SALVADOR GARCIA	)	

COUNT ONE

The SPECIAL MAY 1987 GRAND JURY charges:

1. On or about February 22, 1989, at Cicero and Chicago, in the Northern District of Illinois, Eastern Division,

GLORIA ZAFIRO,
JOSE MARTINEZ,
ALFONSO SOTO and
SALVADOR GARCIA,

defendants herein, conspired and agreed with each other and with other persons known and unknown to the Grand Jury knowingly and intentionally to distribute and to possess with intent to distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, and heroin and marijuana, Schedule I Controlled Substances, in violation of Title 21, United States Code, Section 841(a)(1).

2. It was part of the conspiracy that on or about February 22, 1989, defendants GLORIA ZAFIRO and JOSE MARTINEZ knowingly possessed approximately

7.25 kilograms of cocaine and $23,000 cash in an apartment located on the second floor of the building at 1925 South 51st Court, Cicero, Illinois.

3. If was further part of the conspiracy that on or about February 22, 1989, defendant ALFONSO SOTO did meet with defendants GLORIA ZAFIRO and JOSE MARTINEZ at 1925 South 51st Court, Cicero, then travelled from that location to the alley behind the house and garage located at 3517 West 38th Street, Chicago, Illinois.

4. It was further part of the conspiracy that on or about February 22, 1989, defendant ALFONSO SOTO met with defendant SALVADOR GARCIA in the alley behind 3517 West 38th Street, Chicago, and with him entered the garage at the address, where they were storing approximately 28.5 kilograms of cocaine.

5. It was further part of the conspiracy that on or about February 22, 1989, defendants ALFONSO SOTO and SALVADOR GARCIA knowingly took approximately 25 kilograms of cocaine from the garage at 3517 West 38th Street, Chicago, and transported it to 1925 South 51st Court, Cicero, where defendants GLORIA ZAFIRO and JOSE MARTINEZ were waiting for the cocaine in the second floor apartment.

6. It was further part of this conspiracy that defendants GLORIA ZAFIRO, JOSE MARTINEZ, ALFONSO SOTO, SALVADOR GARCIA, and their co-conspirators misrepresented, concealed and hid, and caused to be misrepresented, concealed and hidden the purposes of and acts done in furtherance of the conspiracy, and used surveillance, counter-surveillance techniques and other means to avoid detection by law enforcement authorities

and otherwise to provide security to members of the conspiracy;

In violation of Title 21, United States Code, Section 846.

COUNT TWO

The SPECIAL MAY 1987 GRAND JURY further charges:

On or about February 22, 1989, at Cicero, in the Northern District of Illinois, Eastern Division

GLORIA ZAFIRO and
JOSE MARTINEZ,

defendants herein, knowingly and intentionally possessed with intent to distribute approximately 7.25 kilograms of a substance and mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

The SPECIAL MAY 1987 GRAND JURY further charges:

On or about February 22, 1989, at Cicero, in the Northern District of Illinois, Eastern Division

GLORIA ZAFIRO and
JOSE MARTINEZ,

defendants herein, knowingly and intentionally possessed with intent to distribute approximately 25 grams

of a substance and mixture containing heroin, a Schedule I Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOUR

The SPECIAL MAY 1987 GRAND JURY further charges:

On or about February 22, 1989, at Cicero, in the Northern District of Illinois, Eastern Division

GLORIA ZAFIRO and
JOSE MARTINEZ,

defendants herein, knowingly and intentionally possessed with intent to distribute approximately 1.75 kilograms of a substance and mixture containing marijuana, a Schedule I Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FIVE

The SPECIAL MAY 1987 GRAND JURY further charges:

On or about February 22, 1989, at Cicero, in the Northern District of Illinois, Eastern Division

ALFONSO SOTO and
SALVADOR GARCIA,

defendants herein, knowingly and intentionally possessed with intent to distribute approximately 25 kilograms of a substance and mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT SIX

The SPECIAL MAY 1987 GRAND JURY further charges:

On or about February 22, 1989, at Chicago, in the Northern District of Illinois, Eastern Division

ALFONSO SOTO

defendants herein, knowingly and intentionally possessed with intent to distribute approximately 3.5 kilograms of a substance and mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

/s/ illegible
FOREPERSON

/s/ illegible
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)
(Certificate Of Service Omitted In Printing)

GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANT'S PRETRIAL MOTIONS

The United States of America, by its attorney, ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, hereby responds to pretrial motions filed on behalf of defendants Gloria Zafiro, Jose Martinez, Alfonso Soto and Salvador Garcia. Because some of these motions overlap, the government will respond by category.

Discovery Motions

Defendants Soto and Garcia filed a 23-page discovery motion with a 19-page supporting affidavit. They ask for discovery in 16 categories, each category containing up to 20 separate demands for discovery. Many of the categories of discovery requested are not even argued in the supporting memorandum *e.g.*, Soto and Garcia's request that this Court order production of grand jury attendance lists and transcripts of colloquy between government attorneys and the grand jury (p.15); their request for an order requiring production of results of tests and reports (p.3); and their request for an order requiring production of documents and objects by the government as well as specific instances of conduct under Rule "608(d)", Federal Rules of Criminal Procedure. Defendants also want

an order for production of home addresses of government agents and a list of "all persons who the government may or may not call in presentation of its case-in-chief" (p.16). Such requests are so far beyond the pale of discovery that the government has difficulty framing an appropriate response.

Many of the items demanded in this motion have already been produced or do not exist, as defendants already know from the Government's April 1, 1989 discovery letter (see Appendix A). In reading this motion, one would think that the Court-ordered discovery conference had never taken place. The government responds that it has met, is meeting and will continue to meet its pretrial discovery obligations in a timely fashion in all matters, including disclosure of documents and physical evidence, results of test when they are complete, and any disclosure that may be required under *Brady* or *Giglio*, if such material exists. With the exceptions noted below, the government objects to the shotgun approach of this word-processing brief and moves that it be stricken as a violation of this Court's Rule Number 2.04.

Discovery of the Informant's Identity.

Soto and Garcia move for discovery of the identity of any confidential informants used by the government in this case, as well as 19 other types of information about any such people.

The government acknowledges that a confidential informant (CI) acted as a tipster in this case. As set forth in paragraphs 2 and 3 of the February 22, 1989 affidavit of Task Force Agent Thomas Bridges, on February 15, 1989,

a CI identified Jose Martinez and Gloria Zafiro as two persons living at 1925 South 51st Court, Cicero, Illinois who were then and there expediting the delivery of multi-kilogram load of cocaine. On the basis of this information, government agents undertook the other acts set forth in the affidavit which ultimately led to the arrest of all four defendants and the application for and granting of a search warrant for 1925 South 51st Court. See Appendix B.

Roviaro v. United States, 353 U.S. 53 (1957) sets forth a balancing test for courts to use in deciding whether to order disclosure of an informants identity. In a recent application of the test in *United States v. Fakhoury*, 819 F.2d 1415, 1424-25 (7th Cir. 1987), the Court of Appeals for the Seventh Circuit noted that where an informer is a "mere tipster," it will rarely be appropriate to disclose his identity; in the *Fakhoury* case, the Court followed this rule, holding that there was no need to disclose the informant's identity when the informant did not testify at trial, but simply provided information that initiated the investigation. *Id.* (citation omitted).

Similarly, in this case a reliable informant acted as a tipster to the Drug Task Force. At this time the government has no intention of calling the informant as a witness at trial. Knowing the informant's identity would not aid any defendant's defense, but would only compromise a productive informant who is serving the public's interest by providing information necessary to apprehend those who have committed crimes. Soto and Garcia's motions to disclose the informant's identity should be denied.

Request for a Witness List

Defense attorneys are not entitled to Government Witness Lists as part of pretrial discovery. *United States v. Bouye*, 688 F.2d 471, 473-74 (7th Cir., 1982) (Citations omitted). Defendant Soto has indicated that he will present an alibi defense, but has not provided his list of witnesses within ten days of the request as required by Rule 12.1(a), Federal Rules of Criminal Procedure. Unless the government is provided with this list sufficiently in advance of trial to perform any necessary investigation, the government would be forced to move either for a continuance or to prohibit testimony from Soto's alibi witness. Once such a list is provided, the government will comply with its disclosure obligations under Rule 12.1(b).

Request for 608(b) Evidence

Nothing under Rule 16, Federal Rules of Criminal Procedure allows a defendant to discover what, if any, evidence the government may use to impeach defense witnesses. *Cf. United States v. Cerro*, 775 F.2d 908, 914-15 (7th Cir. 1985) (in context of a pretrial discovery order applicable to defendant, the appellate court noted that "there is a serious question whether a district judge is empowered to require discovery of impeachment evidence.") If and when any defense witness takes the stand, then the question of whether a particular line of questioning is appropriate becomes ripe. It is not an appropriate area of pretrial discovery, and this motion should be denied.

Defendant's Suppression Motions

All four defendants have moved to quash their arrests and suppress evidence taken from them personally, from the apartment at 1925 South 51st Court, Cicero, and from the house and garage at 3517 West 38th Street, Chicago. These motions should be denied.

Facts

As set forth in more detail in the search warrant affidavit, on February 15, 1989, a confidential informant told a task force agent that defendants Gloria Zafiro and Jose Martinez lived at the second floor apartment at 1925 South 51st Court, Cicero, Illinois, and that they were at that time expecting a large shipment of cocaine. This informant had been 100% accurate on at least five previous tips. Agents verified that telephone bills were sent to J. Martinez at that address, and that the electric bill was sent to Gloria Zafiro. The building at 1925 South 51st Court, Cicero, is a two flat with a common front porch entrance door that is unlocked. A locked door to the right leads to the first floor apartment. A doorless doorway to the left leads to a set of stairs that leads to a locked door at the top of the stairway. This second story locked door leads into the second story apartment. On February 21, 1989 a young male Latin was observed leaving the targeted apartment carrying a blue gym bag, furtively glancing about, then driving circuitously to another residence in Cicero to which he delivered the gym bag. This man then returned to the Zafiro/Martinez apartment, picked up a large black box, and drove off circuitously, so that

surveillance agents were unsuccessful in following him, losing him in traffic.

The next day, agents observed defendant Soto drive up in front of the 1925 South 51st Court building, look up and down the street, then go up the stairs toward the Zafiro/Martinez apartment on the second floor. About ten minutes later Soto descended, and drove off, following a circuitous route. Soto ended up at 3517 West 38th Street in Chicago, a single family dwelling with an unattached garage at the rear. Task Force agents were familiar with this dwelling from previous investigations; that is, other persons being investigated for alleged narcotics activity had either lived at or visited this same house in the past. No previous searches or arrests had take [sic] place at this residence.

When Soto arrived, he drove down the alley toward the unattached garage at 3517 West 38th Street. There, Salvador Garcia joined him in the alley, and both men went into the garage. They returned to the alley carrying a large, long, and apparently heavy cardboard box that they put in the trunk of Soto's car. Soto and Garcia entered the car and Soto drove back to 1925 South 51st Court in Cicero, again in a very circuitous manner. Task Force agents were then aware that circuitous driving is a common technique used during drug transactions because it affords the driver a good chance to identify cars that are "tailing" him and a good chance to lose any tail cars, whether he has identified them or not (be they law enforcement or other persons with knowledge of and interest in any narcotics or money that may be present).

Once parked on 51st Court, Soto and Garcia removed the cardboard box from the trunk, and walked toward 1925. While walking, they glanced furtively up and down the street. This was not just a traffic check, it was the most common-sense way for couriers to see whether unknown persons were watching or approaching them. When Soto and Garcia got to the doorway leading to the stairs to Zafiro's apartment, two task force agents approached them and identified themselves as law enforcement officers.[1] Upon seeing the task force agents, Soto and Garcia dropped the box, which broke open when it hit the floor, and ran up the stairs. The two agents saw then that the box contained wrapped packages that to them looked liked [sic] kilograms packets of cocaine. The agents chased Soto and Garcia up the stairs and found them in Zafiro and Martinez's apartment, where Zafiro and Martinez were also present.

Agents arrested all four people and secured the premises. Documents were seized from the persons of all four defendants incident to their arrest. One agent seized a package out of the abandoned box down in the public stairwell, saw that it did indeed look and feel like cocaine, so he field-tested it. The test was positive for presence of cocaine. The box contained about 25 kilograms of cocaine in 27 packages.

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[1] In Paragraph 8 of the Search Warrant Affidavit, Detective Bridges states that there was a doorway on the first floor leading to the staircase, and this door then opened. Detective Bridges was wrong. There was no door on the first floor doorway. The door was onto the porch, not into the stairwell. bridges misunderstood what he was told by the agents who approached Soto and Garcia.

A group of agents drove to 3517 West 38th Street in Chicago whence Soto and Garcia had obtained this box of cocaine. There they met a woman who identified herself as Belen Soto, a cohabitant of the house with her husband, defendant Alfonso Soto. Task Force Agent Lupe Rodriguez conducted the conversation with Mrs. Soto in Spanish. Mrs. Soto was not arrested or threatened with arrest, no guns were drawn. Rodriguez asked her if the agents could search the house and the garage. Rodriguez told Mrs. Soto that she did not have to consent. Mrs. Soto agreed to the search. The agents did not have a Spanish language consent to search form with them, so Rodriguez translated an English form orally for Mrs. Soto. She then signed the consent to search form. See Appendix C.

Agents searched the house and the garage. In the house, agents found an Ohaus triple beam scale. In the garage, agents saw a Ford Probe automobile. An agent then used a car key taken earlier from Alfonso Soto to open the car's trunk. In it, he found a blue duffle bag. Agents looked inside the duffle bag and found approximately 3.5 kilograms of cocaine wrapped in four packages.

Thereafter, one of the agents, Detective Thomas Bridges, came to the federal building to prepare an affidavit for a search warrant for the Zafiro-Martinez apartment on South 51st Court in Cicero. Because of time constraints, Bridges' handwritten affidavit was presented to Magistrate Balog at about 4:50 p.m. that afternoon. A verbatim typed transcription has since been prepared for use in these proceedings. Magistrate Balog issued the warrant that afternoon and agents searched the apartment. In a suitcase in a bedroom closet, agents found

about 7.25 kilograms of cocaine, one ounce of brown heroin and about four pounds of marijuana. In a knapsack in a closet, agents found about $23,000 in cash. Certain documents and papers were also seized during the search.

Motions to Quash Arrests

All four defendants have moved to quash their arrests and to suppress evidence seized incident to those arrests. These motions should be denied because there was probable cause to arrest all four defendants, as well as exigent circumstances justifying the agents entry into Zafiro and Martinez's apartment.

Law enforcement agents may arrest a person without a warrant if the information available to the agents at the time of the arrest indicates that that person has committed a crime. *Bevier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986). "Probable cause is a function of information and exigency." *Id.* at 127, *citing Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985). Probable cause is a "fluctuating concept" dependent on factual and practical considerations of everyday life. *Id.* at 126, quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983). Probable cause is determined by considering the totality of the circumstances. *Id.* It requires only a probability or a substantial chance of criminal activity, not an actual showing of such activity; law enforcement agents have probable cause to arrest a person where the facts and circumstances within their knowledge, based on reasonably trustworthy information, are sufficient to cause a prudent person to believe that the persons arrested were committing an offense.

United States v. Lima, 819 F.2d 687, 688 (7th Cir. 1987) (citations omitted). In the contest of a civil suit, the Seventh Circuit has noted that "if the police have probable cause, the arrest is lawful; and they have probable cause if they believe, with reason, that their informant was telling the truth." *McKinney v. George*, 726 F.2d 1183, 1187 (7th Cir. 1984).

Here, an unerring confidential informant supplied task force agents with two names, an address, a time frame, and the general type and amount of the transaction. Agents corroborated this information with personal observations, set forth above. In sequence, agents collectively learned that Zafiro and Martinez did live where the CI said; they saw an unknown man visit them and leave, engaging in countersurveillance driving; they saw Soto arrive and leave, engaging in countersurveillance driving; they observed Soto drive to a house with which agents had had previous contact in other narcotics investigations; they watched Soto and Garcia engage in countersurveillance driving when they returned to Zafiro and Martinez's apartment with the large heavy box; they saw both men looking furtively as they carried the box; they saw both men flee from agents who approached them and identified themselves as law enforcement agents;[2] and they saw what appeared to be packages of cocaine in the broken box as they chased Soto and Garcia up the stairs into Martinez and Zafiro's apartment.

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[2] Flight can be strong evidence of guilt. *United States v. Lima*, 819 F.2d at 689 (citations omitted).

Under the totality of facts and circumstances known to them at that time, the agents clearly had trustworthy information to believe that Soto and Garcia were delivering a large load of cocaine to Zafiro and Martinez, just as the informant had told them. The agents thus were justified in arresting all four defendants.

Arresting Zafiro and Martinez in their home was justified because exigent circumstances clearly required entry into the apartment without taking time to obtain arrest warrants. Agents were in hot pursuit of fleeing felons who were then and there committing a major felony, namely cocaine distribution. Agents had to pursue Soto and Garcia into the apartment and arrest all four defendants because if they had not, it is a virtual certainty that all four defendants would have fled and equally likely that the defendants would have removed or destroyed the narcotics and papers stashed in the apartment. These are exactly the circumstances under which warrantless arrests in the home are allowed. *E.g., Welsh v. Wisconsin*, 466 U.S. 740, 749-53; *United States v. Altman*, 797 F.2d 514, 515 (7th Cir. 1986). Having interrupted the delivery of over 50 pounds of cocaine by identifying themselves as police officers, the agents had a duty to prevent the distributors from escaping and to prevent from alerting Zafiro and Martinez so that they could destroy evidence and then escape. Had agents waited outside until a warrant was obtained, any contraband in the apartment would have been rinsed or flushed down the pipes and any documents burned long before any entry and arrest could have taken place. The entry was lawful because of these exigent circumstances.

Once the agents had arrested the defendants, they had a legal right to conduct an incidental search. *E.g., United States v. Queen*, 847 F.2d 346, 352 (7th Cir. 1988). Documents taken from each of these defendants was taken after a lawful arrest and therefore cannot be suppressed.

The Consent Search at 3517 West 38th Street

The search of the house and garage were pursuant to consent given by a co-occupant, Mrs. Belen Soto. A search conducted pursuant to valid consent is an exception to the requirement of a warrant or probable cause. *United States v. Marin*, 761 F.2d 426, 433 (7th Cir. 1985), *citing Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). The consent must be voluntary, and it must be given by a person with common authority to consent to the search. *Id., citing United States v. Matlock*, 415 U.S. 164, 171 (1974).

Here, there is no real question that Mrs. Soto is married to defendant Alfonso Soto and that on February 22, 1989, she lived at 3317 West 38th Street. This gave her common authority over the house and garage. *E.g., United States v. Marin*, 761 F.2d at 433; *United States v. Sealey*, 830 F.2d 1028, 1031 (9th Cir. 1987).[3]

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[3] Salvador Garcia has moved to suppress evidence taken from 3517 West 38th Street, claiming that he lives there. The government has no knowledge of Garcia's occupancy of the house. He has no standing to suppress the cocaine taken from its garage. In any event, Mrs. Soto was and is an occupant with authorize the search that was undertaken.

Under the totality of the circumstances, Mrs. Soto's consent was voluntary. Among the circumstances to consider are Mrs. Soto's age, education, apparent intelligence, whether she was in custody, whether the requests were repeated or prolonged, whether she was advised she did not have to consent, whether the request was subtly coercive, and whether Mrs. Soto was in a vulnerable subjective state. *E.g. United States v. Rojas*, 783 F.2d 105, 109 (7th Cir. 1986) (citations omitted). Here, Mrs. Rojas was an intelligent adult who spoke coherently with agent Rodriguez about the search. There was no language barrier. She was not under arrest, nor threatened with arrest, nor subjected to any intimidation in the form of drawn guns, large groups of agents, or loud voices. Rodriguez advised Mrs. Soto that she did not have to consent. Rodriguez translated an English consent form for Mrs. Soto, which she then signed. Although she knew her husband was in custody, there was not indication that she was upset to the point of not understanding what she was doing. *See United States v. Marin*, 761 F.2d at 434. *See also United States v. Rojas*, 783 F.2d at 109-110, in which defendant's consent to search was held voluntary when he had a slight language barrier, was under arrest, handcuffed, and placed in the smallest room in his apartment prior to consenting. Here, Mrs. Soto [sic] consent was clearly given voluntarily.

The scope of the consent search included the garage. "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *United States v. White*, 706 F.2d 806, 808 (7th Cir.

1983) *quoting United States v. Ross*, 456 U.S. 798, 820 (1984). This would include a sealed container such as the trunk of a car in the garage for which Mrs. Soto had given consent to search. Mrs. Soto knew that agents were searching in the garage but did not object to or limit that search in any manner. This constitutes continued consent. *E.g. United States v. Sierra-Hernandez*, 581 F.2d 760, 764 (9th Cir. 1978) *cert. denied*, 439 U.S. 936 (1978). Therefore, the cocaine seized from the automobile, as well as the triple-beam scale found in the house were properly discovered and seized. They are admissible at trial as evidence of the conspiracy.

The Search at 1925 South 51st Court

Defendants motions to suppress evidence taken from 1925 South 51st Court in Cicero should be denied. Evidence seized from that apartment, namely documents, cash and narcotics, were all discovered during a search authorized by a warrant issued that day by a federal magistrate. In reviewing the issuance of this warrant, this Court should uphold Magistrate Balog's decision "so long as he had a substantial basis for concluding that a search would uncover evidence of wrongdoing." *United States v. Griffin*, 827 F.2d 1108, 111 (7th Cir. 1987) quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983). In independently reviewing the sufficiency of the affidavit, this Court should apply the principle that "doubtful cases should be resolved in favor of upholding the warrant." *Id.* (citations omitted).

Here, the affiant supplied information in support of a request to search the Zafiro/Martinez apartment for

narcotics, narcotics residue and paraphernalia, documents, records, photographs and money.[4] The information provided by Detective Bridges in his affidavit, read as a whole, in the realistic and common sense manner, alleged enough specific facts and circumstances from which Magistrate Balog could reasonably conclude that money, records, paraphernalia or more drugs were associated with the crime and located at the Zafiro/Martinez apartment. *See United States v. Griffin*, 827 F.2d at 1111, quoting *United States v. Pritchard*, 745 F.2d 1112, 1120 (7th Cir. 1984).

Here, a reliable informant had told agents that Zafiro and Martinez were expecting delivery of a large shipment of cocaine at the apartment. Martinez and Zafiro were present in the DEA's NADDIS computer as associates in a heroin smuggling organization. Officers caught Soto and Garcia in the act of delivering 25 kilograms of cocaine to this address. Both men fled into Zafiro and Martinez's apartment. One day before, an unknown man had exchanged parcels at this apartment while engaging in countersurveillance driving. On February 22, 1989, two other men entered and left the apartment an hour before Soto first arrived on the scene. All of this evidence taken together supports the conclusion that there was probably

[4] Defendant Martinez moves to quash the warrant on the grounds that although the caption and affidavit clearly and correctly name Cicero as the town in which the Zafiro/Martinez apartment is located, the body of the warrant incorrectly states that Chicago is the city. Where, as here, there was no doubt in the affiants or the magistrate's mind as to the location to be searched, a scrivner's error cannot defeat the warrant. *See United States v. Bentley*, 825 F.2d 1104, 1109 (7th Cir. 1987).

money and documents in the apartment, and probably other drugs as well. The evidence indicated first, that some sort of delivery or exchange had taken place a day before, and second, that Zafiro and Garcia were expecting a cocaine delivery of exactly the sort that Soto and Garcia were caught making. It was highly likely that money or records relating to one or both of these deliveries would be found in the Zafiro/Martinez apartment. Under the standards set forth in *Griffin*, this court should uphold the issuance of the search warrant and deny defendants' motions to suppress evidence seized as a result of it.

The Box of Cocaine

The box containing approximately 25 kilograms of cocaine was seized in a public area with its contents in plain view after Soto and Garcia had abandoned it but before they were arrested. Both the plain view doctrine and the abandoned property doctrine are exceptions to the warrant requirement of the Fourth Amendment. Therefore, the seizure of this box without a warrant was lawful.

Police may seize an item without a warrant under the plain view doctrine if their presence in the area is lawful, the discovery is inadvertent, and the criminal nature of the item is immediately apparent. *United States v. Diaz*, 814 F.2d 454, 460 (7th Cir.), *cert. denied*, ___ U.S. ___ 108 S.Ct. 166 (1987) (citations omitted). Here, the agents were in the public entryway/stairwell of a two-flat apartment building. They saw the cocaine packages in the cardboard box only after Soto and Garcia had dropped the box, causing it to break. The agents immediately recognized

the packages to be cocaine (an observation corroborated by the circumstances of the investigation that morning). Thus, all three criteria are met and the search was lawful under the plain view doctrine.

Further, the agents had a right to seize the box and its contents because Soto and Garcia abandoned it. When individuals abandon property, they forfeit any expectation of privacy they might have had in it; therefore, a warrantless search of such property is not unreasonable under the Fourth Amendment. *Abel v. United States*, 362 U.S. 217, 241 (1959); *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983), *cert. denied*, 464 U.S. 859 (1983); *Cf. United States v. Herrera* 757 F.2d at 147 (discarded garbage may be searched without warrant because there is no legitimate expectation of privacy). The existence of police pursuit or investigation at the time of abandonment does not of itself render the abandonment involuntary. *United States v. Jones*, 707 F.2d at 1172. The test for abandonment is an objective determination based on words spoken, acts done and other facts as to whether the individual has retained any reasonable expectation of privacy in the object. *Id.*

Here, when agents approached Soto and Garcia in the public area of an apartment building and simply identified themselves as police, Soto and Garcia dropped the box so fast that when it hit the floor it broke. Both men raced up the stairs without talking to police, and without securing their box in any way from other members of the public who might enter the stairwell area of the building. All circumstances point toward a quick and complete relinquishment of any and all proprietary interests in the box.

Indeed, this denial of ownership continues in Soto and Garcia's pretrial motions. Each avers that the box belonged to the other. If neither claims prior ownership of the box and its contents, neither has standing to move to suppress it at trial. *E.g., United States v. Herrera*, 757 F.2d at 147, citing *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980).

Under all three of the analyses set forth, the conclusion is the same: defendant's motions to suppress the box and its contents from evidence should be denied., [sic]

Defendants Soto's and Garcia's Motions to Sever

Defendants Soto and Garcia have filed virtually identical motions for severance, each disclaiming any possessory interest in the box of cocaine they both carried and each denying any knowledge of its contents. Soto says it was Garcia's box, Garcia says it was Soto's.

This court may grant a severance under Rule 14, Federal Rules of Criminal Procedure if defendants assert mutually antagonistic defenses, that is only when acceptance of one defendant's position precludes acquittal of the other defendant. *United States v. Turk*, No. 88-1171 and 1172 (7th Cir. March 22, 1989), slip. op. at 4 (citations omitted). There is a strong public interest in having persons jointly indicted tried together, especially where the evidence against the defendants arose out of the same series of acts. *Id.* (citations omitted). "Fingerpointing is an acceptable cost of the joint trial and at times is even beneficial because it helps complete the picture before the trier of fact." *United States v. Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.), *cert. denied*, 108 S.Ct. 67 (1987). "Joint trials

reduce the chance that each defendant will try to create a reasonable doubt by blaming an absent colleague, even though one or the other (or both) undoubtedly committed a crime. The joint trial gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome . . . Inconsistent defenses may also create prejudice. But as a rule, evidence and arguments may be controlled by the court, and inconsistent defenses are not enough to require severance." *Id.* (citations omitted). *See also United States v. Novak*, Nos. 88-2562 and 88-2563 (7th Cir. March 29, 1989), slip. op. at 16-17 ("defendant carries the burden of establishing actual prejudice to the extent that a fair trial could not be had jointly with the other defendant"). In *Novak*, codefendants Novak and Leon were arrested together at the Milwaukee airport after they had flown together from Florida. Leon was carrying a dufflebag with cocaine in it. They were tried together, despite Novak's motion for a severance on the ground that he was claiming no knowledge that Leon's bag contained cocaine. Leon, who did not request severance, defended himself as a nonparticipant: some third party put the cocaine in his bag. Leon testified at trial, however, that Novak had told him that he (Novak) was a cocaine peddler. *Id.* The court of appeals held that "a joint trial was clearly appropriate." *Id.* at 17.

Here, there is nothing in the record to indicate that a severance should be granted. First, neither Soto nor Garcia has testified under oath or submitted a sworn affidavit to show either that they actually will testify, or what the contents of that testimony will be. The proffer by the attorneys is not enough. Second, if the testimony

of each defendant is simply that the box was not his, it was the other guy's, this is not enough for a severance. Absent sworn testimony from Garcia that Soto indicated to Garcia he was aware of the contents of "his" box, and sworn testimony from Soto that Garcia indicated to Soto he was aware of the contents of "his" box, there is nothing irreconcilable about their defenses. Both are claiming not to know what was in the box. The jury could, for example, believe Soto's testimony that he was helping Garcia carry a box, and still acquit Garcia because there was insufficient evidence that Garcia knew what was in the box, and therefore could not be found guilty of knowingly and intentionally distributing anything. The jury could reverse the scenario and also acquit them both. In either event, the defenses are not mutually antagonistic to the point of requiring severance.[5] Nothing offered by either defendant *precludes* acquittal of the other. *See United States v. Buljubasic*, 808 F.2d at 1263. Severance is not appropriate at this time, and in the government's view, never will be. The joint trial gives the jury the best perspective on the evidence and therefore increases the likelihood of a correct verdict. *Id*. Both motions for severance should be denied.

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[5] Clearly, if Soto and Garcia both testify as proffered by their respective attorneys, at least one of them has to be lying. The government's position is that they are both lying because they were in joint, knowing possession of the cocaine as coconspirators with Zafiro and Martinez. Garcia and Soto are simply playing games with this Court, the Rules of Criminal Procedure, and the truth in an attempt to gain a perceived tactical advantage for both of them at trial. *See United States v. Buljubasic*, 808 F.2d at 1263.

Conclusion

For the reasons stated above, defendant's pretrial motions should be denied.

Respectfully submitted,

ANTON R. VALUKAS
United States Attorney
BY: /s/ Stephen Crocker
STEPHEN CROCKER
Assistant United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

ORDER

Following their indictment on drug conspiracy charges, defendants Gloria Zafiro, Jose Martinez, Alfonso Soto, and Salvador Garcia have filed a variety of pretrial motions. This court cannot decide some of defendants' motions without first resolving certain factual disputes. For this reason, the court has instructed Magistrate Bucklo to conduct an evidentiary hearing concerning defendants' motions to quash certain arrests, quash a search warrant, and suppress certain evidence seized by government agents. Having referred these motions to the magistrate, the court will now rule on the remainder of defendants' motions.

I. Motions to Adopt

Martinez, Soto, and Garcia have moved to adopt the pretrial motions of their codefendants. To the extent that any defendant's motion applies to any or all codefendants, the court grants the three defendants' motions to adopt.

II. Discovery Motions

Pursuant to Fed. R. Crim. P. 16, Martinez moves for disclosure of all statements that the government seeks to attribute to him. The government responds that it has

satisfied and will continue to satisfy its obligations under Rule 16. Based on the government's representations, this court denies Martinez's discovery motion.

In addition to Martinez's request for disclosure, Soto and Garcia have filed a 23-page discovery motion. They seek to discover a wide assortment of documents and information. Without addressing every aspect of the lengthy motion filed by Soto and Garcia, the government asserts that it has fully compiled with the discovery requirements imposed by Rule 16, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The government also points out that several of the requests made by Soto and Garcia fall outside the scope of Rule 16. Specifically, the government objects to defendants' requests for the identity of confidential informants, a list of government witnesses, and evidence in the government's possession that tends to impeach defense witnesses.

The government acknowledges that it relied on a tip from a confidential informant when it initiated its investigation of defendants. Nonetheless, the government insists that it should not have to disclose the identity of its confidential informant. This court agrees with the government's position. The government has indicated that it does not intend to call the informant as a witness at trial. Moreover, the informant did not witness any of the crimes with which defendants are charged; he merely provided the tip that launched the investigation. Thus, disclosure of the informant's identity will not appreciably assist defendants in preparing for trial. Under these circumstances, the government's interest in maintaining the confidentiality of its informant's identity outweighs

defendants' need for disclosure. *See United States v. Fakhoury*, 819 F.2d 1415, 1424-25 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 749 (1988).

The government has also balked at defendants' request for a list of prospective government witnesses. As the government notes, the Federal Rules of Criminal Procedure do not entitle a defendant to a list of prospective witnesses. *United States v. Bouye*, 688 F.2d 471, 473-74 (7th Cir. 1982). Consequently, this court will not require the government to produce such a witness list. Of course, once Soto supplies the government with a list of witnesses who will testify in support of Soto's alibi defense, the government will have to provide Soto with a list of witnesses who will tend to rebut Soto's alibi. *See* Fed. R. Crim. P. 12.1(a), (b).

The government's final objection concerns defendants' request for evidence tending to impeach defense witnesses. The Federal Rules of Criminal Procedure do not require the government to disclose impeachment evidence. In fact, according to the Seventh Circuit, "there is a serious question whether a district judge is empowered to require discovery of impeachment evidence" by federal criminal defendants. *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985). Because this court lacks clear authority to mandate discovery of impeachment evidence, the court will not order the government to disclose such evidence in the instant case.

For the most part, the government appears to have complied with defendants' reasonable discovery requests. Nonetheless, the government has not indicated whether it has instructed its agents to preserve the notes they made

while investigating defendants. Given the government's silence on this issue, the court will enter an order directing the government to take steps to preserve its agents' notes. In all other respects, however, the court denies the discovery motion filed by Soto and Garcia.

III. Motions to Sever

Shortly before making arrests in this case, government agents accosted Soto and Garcia while the two defendants were carrying a box into the building where Zafiro and Martinez reside. When the government agents identified themselves, Soto and Garcia dropped the box and fled to the apartment occupied by Zafiro and Martinez. The government later determined that the box contained cocaine. At trial, Soto and Garcia intend to point accusatory fingers at each other. Each defendant claims that he did not own the box or know its contents. Each defendant also asserts that he was simply helping to carry the box at the request of the other defendant. Soto and Garcia characterize their trial strategies as "mutually antagonistic defenses." Based on this characterization, both defendants have moved to sever their cases from each other pursuant to Fed. R. Crim. P. 14.

A court should resort to severance only when the defenses of multiple defendants would produce inevitable prejudice in the context of a joint trial: "Unless the defenses are so inconsistent that the *making* of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense *precludes* acquittal of other defendants, it is not necessary to hold separate trials." *United States v. Buljubasic*, 808

F.2d 1260, 1263 (7th Cir.) (emphasis in original), *cert. denied*, 108 S. Ct. 67 (1987). The circumstances that might warrant severance do not exist in the instant case. In evaluating the government's case against Soto and Garcia, a jury could accept the defense offered by one defendant while concluding that the government did not sufficiently establish the guilt of the other defendant. For this reason, the court does not regard the defenses asserted by Soto and Garcia as mutually antagonistic. The court acknowledges that a joint trial will probably produce a strategic conflict between Soto and Garcia. Nonetheless, "[f]inger-pointing is an acceptable cost of the joint trial and at times is even beneficial because it helps complete the picture before the trier of fact." *Id.* For all their "finger-pointing", Soto and Garcia do not plan to assert mutually antagonistic defenses. Therefore, the court denies the two defendants' motions to sever.

CONCLUSION

For the foregoing reasons, the court grants the motions to adopt filed by Martinez, Soto, and Garcia. The court also orders the government to instruct its agents to preserve the notes they made while investigating defendants. In all other respects, however, the court denies defendants' discovery motions. Finally, the court denies the motions to sever filed by Soto and Garcia.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
Nicholas J. Bua
Judge, United States District Court

Dated: July 11, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

REPORT AND RECOMMENDATION

Gloria Zafiro, Jose Martinez, Alfonso Soto, and Salvador Garcia were arrested and charged with conspiracy to distribute and possess approximately 33.5 kilograms of mixtures containing cocaine, in violation of 21 U.S.C. § 846.[1] The defendants have filed various motions to quash their arrests, to quash a search warrant executed by the government in this matter, and to suppress evidence seized by the government following the defendants' arrests. This matter has been referred to me for a report and recommendation on defendants' motions, and an evidentiary hearing was held on August 3 and 4, 1989.

Facts

At the hearing, the government primarily relied on the testimony of Chicago Police Lieutenant Maurice Dailey, a supervisor with the joint Drug Enforcement Administration/Chicago Police Department Task Force with 14-15 years experience in narcotics investigations. He testified that on February 15 or 16, 1989, drug task force Agent Lupe Rodriguez, a Chicago police detective, was told by a confidential informant that Jose Martinez and

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[1] A subsequent indictment has charged the four defendants with six counts of conspiracy to distribute and possession with intent to distribute various controlled substances.

Gloria Zafiro were expecting a multi-kilogram shipment of heroin and cocaine that would arrive at their residence at the second floor apartment of 1925 South 51st Court, Cicero, Illinois. This particular informant had provided drug task force agents with information on at least three previous occasions, and on each of these occasions, narcotics had been seized and arrests had been made based on the informant's information.

After hearing from the informant, drug task force agents checked Illinois Bell Telephone Company records, and learned that the telephone subscriber on the second floor of 1925 South 51st Court in Cicero was either a J. Martinez or Jose Martinez. In addition, agents checked Commonwealth Edison records, and learned that the electric service on the second floor was in the name of Gloria Zafiro.

Based on this information, drug task force agents began periodic surveillance of the 1925 South 51st Court building on February 17 or 18, 1989. The building, a brick two-flat, has five concrete steps that lead to a porch. At the back of the porch, there is a doorway leading into the apartment, with an outer aluminum-frame storm door with a glass panel on the upper half that opens out toward the porch, and an inner wooden door with a diamond-shaped glass panel that opens into a small hallway. At the right end of the small hallway, immediately to the right of the doorway, there is a locked door to the first floor apartment. To go to the second floor apartment, a person entering must go to the left around the wooden door which when open to a 90 degree angle blocks all but a few inches of the path to the stairs. The stairs climb about five or six steps to a landing, then turn and rise to a

locked door that leads into the second floor apartment. Officer McDermott, who was observing the front of the building for the task force, testified that the inner wooden door remained open during the time he was observing the building, so that through the glass panel of the storm door he could see whether a person was coming from or going to the second floor apartment. His testimony was corroborated in part by Ms. Lara, the sister of Ms. Zafiro, who testified that because her sister living upstairs had no key to the downstairs wooden door, it generally remained open during the day.

Lieutenant Dailey also testified that he had received information that when a Ford Bronco was seen near the Cicero residence, the shipment would soon arrive. Lieutenant Dailey testified that either the evening of February 21 or the morning of February 22, he was told by one of his agents that the Bronco had been seen, and by the morning of February 22, 1989, he had assigned eight officers to full-time surveillance of the 1925 South 51st Court building.

That morning, at approximately 11 a.m., agents observed a man later identified as defendant Alfonso Soto park a maroon Buick in front of the 1925 South 51st Court apartment, and look up and down the street before entering the building and then the second floor apartment. About ten minutes later, he left the apartment and drove in a circuitous manner to the alley behind 3517 West 38th Street, Chicago. Lieutenant Dailey testified that by "circuitous," he meant that Mr. Soto often retraced his path, went back and forth on various streets, and stopped on the side of the road and looked around as if checking for anyone following. Lieutenant Dailey testified that

such driving was typical of that used in drug transactions. Lieutenant Dailey also said that he was familiar with the 3517 West 38th Street residence from previous investigations involving narcotics trafficking during the past 11 years. After Mr. Soto parked behind the garage at 3517 West 38th Street, he was joined by another male hispanic, now known to be defendant Salvador Garcia. Both entered the garage, and came out with a "real big" box (later shown to be a box that had contained a chair purchased by Mr. Soto), and put it in the trunk of Mr. Soto's car. Both then entered the car, and Mr. Soto again drove in a circuitous manner back to 1925 South 51st Court in Cicero and parked. Mr. Soto and Mr. Garcia opened the trunk, and they carried the box to the entrance of the building, again looking up and down the street in a furtive manner. At that point, Lieutenant Dailey believed, based on his experience, the furtive glances, the circuitous driving, and his previous experience with the West 38th Street house, in addition to the information received from the informant, that Messrs. Soto and Garcia were moving narcotics. He told one agent, by radio, to cover the back of the house, left his car parked about eight car lengths north of 1925 South 51st Court, and walked toward that address. As he left his car, the two defendants climbed the steps to the porch, then opened the aluminum-framed storm door and entered the building, and apparently maneuvered around the inside door and headed upstairs. Lieutenant Dailey testified that as he reached the bottom step to the porch, he could see one of the defendants and a part of the cardboard box inside the small hallway. He testified that he yelled, "Police officer, hold it a minute," but that the men dropped the

box, and ran up the stairs. He then followed with his gun drawn. Lieutenant Dailey testified that as he ran up the stairs, he saw the box laying across the bottom three or four steps, broken open so that he could see at least two taped packages that based on his experience he believed to contain narcotics. Lieutenant Dailey said that he did not stop to look at the box, but either jumped over or moved around the box and ran up the stairs after the two men. He entered the upstairs apartment, where the door was open, and where in addition to Messrs. Soto and Garcia, he saw Mr. Martinez standing without a shirt on, and Ms. Zafiro sitting on a couch in the living room. He had other officers, who had followed him into the building, look in other rooms of the apartment for other persons. When he determined that the apartment was secure, he went back downstairs, and field-tested the package that had partly fallen outside the box for cocaine. The test was positive. He then went back upstairs and told each of the four individuals that they were under arrest, and one of the other officers gave Miranda warnings to those arrested. Lieutenant Dailey then a did a pat-down search of each of the four individuals, and took papers and the keys from each.[2]

Following the arrests, a group of agents drove to the 3517 West 38th Street residence in Chicago, where Messrs.

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[2] In her motion to suppress, Ms. Zafiro claims that the government also took mail, a handbag, and other personal effects. However, at the hearing, she put on no evidence to challenge the government witnesses' testimony that only papers and keys were taken from the persons of the four defendants after their arrests.

Soto and Garcia had obtained the box of cocaine. Detective Rodriguez testified that he and Lieutenant Dailey went to the front door, where they met a woman who identified herself as Belen Soto, the wife of the defendant Mr. Soto, and who lived there. He testified that Mrs. Soto was not arrested or threatened with arrest, nor were any guns drawn. He said that, conversing in Spanish with Mrs. Soto, he asked her if the agents could search both the house and the garage, also telling her that she did not have to consent to the search. Nonetheless, she agreed to the search. Because the agents did not have a Spanish language consent form with them, Detective Rodriguez and Lieutenant Dailey both testified that Mr. Rodriguez orally translated the form into Spanish for Mrs. Soto, who them signed it. *See* Government Exhibit 3.

Mrs. Soto also testified at the hearing through a translator. She testified that four or five police officers came to her front door, including Detective Rodriguez. She said that Detective Rodriguez told her that her husband had been arrested and that he had to check the house. She testified that he did not ask for her consent to search the house, nor did Detective Rodriguez tell her that she did not have to permit the officers to search the house. Mrs. Soto, who was at the house with her two infants, said that the officers told her to sit in the kitchen and not move. According to Mrs. Soto, some officers went to the basement and others then went to the garage, while she was not permitted to move from the table. At the close of cross-examination, she emphatically stated that Detective Rodriguez did not read the consent form to her.

However, earlier on cross-examination, she acknowledged that she had signed the consent form, that Detective Rodriguez spoke to her in Spanish, that he told her that her husband had been arrested, and that he had asked her if she had narcotics in the house, to which she replied "no." She also replied, "maybe," when the Assistant United States Attorney asked her, for the second time, whether it was possible that she had told Detective Rodriguez that it was all right for the agents to search the house. The first time she was asked this question, she stated she did not remember.

Lieutenant Dailey testified that, having obtained what he believed to be a valid consent to search, he had agents search both the house and garage. During the subsequent search of the house, agents found a triple beam scale. In the garage, the agents saw a Ford Probe, which was opened using a car key that had been taken previously from Mr. Soto. In the car, agents found a blue duffle bag that they opened, and which contained approximately four kilograms of cocaine. The scale, the car, and the cocaine were seized.

Following the search of the house and garage, one of the agents prepared an affidavit for a search warrant for the second floor apartment at 1925 South 51st Court in Cicero. The warrant was issued that afternoon by Magistrate Balog, and agents then searched the Cicero apartment. In the apartment, the agents seized a suitcase in the bedroom closet that contained 7.25 kilograms of cocaine, an ounce of brown heroin, and about four pounds of marijuana. Agents also seized a knapsack that contained $23,000.00 in cash. In addition, other documents and papers were seized during the search.

Ms. Zafiro and Mr. Martinez have filed motions to quash their arrests, and all defendants have moved to suppress evidence seized during searches incident to their arrests, and during searches of the 3517 West 30th Street apartment and garage, and the search of the 1925 South 51st Court apartment. I recommend that all these motions be denied.

Motion To Quash Arrest

Initially, Mr. Martinez and Ms. Zafiro have moved to quash their arrests, contending that the arrests were made without probable cause and without a warrant. I disagree.[3]

The existence of probable cause depends upon "factual and practical considerations of everyday life," *BeVier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986) (quoting *Illinois v. Gates*, 462 U.S. 213, 231, 76 L.Ed.2d 527, 544 (1983)), including tips received from informants, as well as the unusual reliability of a particular informant. *Id.* at 232-234, 76 L.Ed.2d at 544-546. *See McKinney v. George*, 726 F.2d 1183, 1187 (7th Cir. 1984) (police have probable cause if they believe, with reason, that their informant was telling the truth).

In this case, the government had information from an unusually reliable informant, who had provided correct information on at least three previous occasions, that Mr.

[3] Since the defendants were later indicted by a grand jury, whether there was probable cause to arrest the defendants on February 22 is relevant only to whether the evidence seized incident to that arrest should be suppressed.

Martinez and Ms. Zafiro were expecting a multi-kilogram shipment of cocaine to be delivered to their residence at 1925 South 51st Court in Cicero. Further, the agents had confirmed through checks with various utility companies that a J. Martinez and a Gloria Zafiro were customers for the second floor apartment at 1925 South 51st Court. Finally, agents observing the 1925 South 51st Court apartment had noted persons entering and leaving the apartment acting in a suspicious manner. Agents observed Mr. Soto look up and down the street before entering the building, and then followed him, via a circuitous route, to a residence that had previously been involved in narcotics investigations. Moreover, when Messrs. Soto and Garcia returned to the 1925 South 51st Court apartment carrying a large box, and were stopped at the door to the building by an officer who identified himself as such, the defendants immediately dropped the box and ran up the stairs. Probable cause does not mean that an officer must have a virtual certainty that a crime is being committed. Rather, probable cause means that an agent have a reasonable basis for believing that a search or seizure will turn up the perpetrator of a crime. *Llaguno v. Mingey*, 763 F.2d 1560, 1565, (7th Cir. 1985), *cert. dismissed*, 107 S.Ct. 16 (1986). Here, given the totality of the circumstances, the agents observing the 1925 South 51st Court apartment had probable cause to believe that Mr. Garcia, Mr. Soto, and the residents of the apartment, that is, Mr. Martinez and Ms. Zafiro, were engaged in a drug trafficking conspiracy.

Mr. Martinez and Ms. Zafiro also claim that their arrests should be quashed because the drug task force agents arrested them without warrants. Generally, more

than probable cause is required for an in-home arrest. Police must secure a warrant unless they can show some exception to the warrant requirement. *United States v. Altman*, 797 F.2d 514, 515 (7th Cir. 1986). The Supreme Court has recognized only a few emergency conditions that justify warrantless home arrests. These include, however, hot pursuit of a fleeing felon, and destruction of evidence. *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 80 L.Ed.2d 732, 743 (1984) (citing cases). In this case, the agents followed the fleeing Mr. Soto and Mr. Garcia, whom they had probable cause to believe were committing a felony, *i.e.*, distributing cocaine, into the upstairs apartment of Mr. Martinez and Ms. Zafiro, whom the agents had probable cause to believe were also involved in a conspiracy to distribute the controlled substance. When Messrs. Garcia and Soto fled into the apartment after having been asked to stop by Lieutenant Dailey, it is reasonable to assume that had the agents not followed the fleeing men upstairs and arrested the occupants of the apartment, the defendants would have either fled the apartment or attempted to destroy evidence, such as drugs and records or other documents. Accordingly, exigent circumstances for the warrantless in-home arrests of Mr. Martinez and Ms. Zafiro were present in this case, and I recommend that Mr. Martinez' and Ms. Zafiro's motions to quash their arrests be denied.

Next, the defendants claim that papers and documents seized from their person following their arrests should be suppressed. Again, I disagree. Government agents may conduct a limited search incident to arrest in the immediate area surrounding the arrestee. *United States v. Queen*, 847 F.2d 346, 352 (7th Cir. 1988). Here, the

documents and papers seized from the four defendants following their arrests were taken from their person. Thus, the search was limited to the area within the arrestee's immediate control. Since there was probable cause to arrest the four defendants, the seizure of papers and documents from their person following the arrest was a proper search incident to arrest. *Id.* Accordingly, I recommend that defendants' motions to suppress that evidence be denied.

Next, Messrs. Soto and Garcia claim that the search of the Sotos 3517 West 38th Street home was made without the consent of the owners, and that the evidence seized there should be suppressed. A search conducted pursuant to consent is one of the specifically established exceptions to the requirements of both a warrant and probable cause. *United States v. Marin*, 761 F.2d 426, 433 (7th Cir. 1985) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L.Ed.2d 854 (1973)). The prosecution has the burden of establishing that consent to a search was freely and voluntarily given, and whether a consent was voluntary is a question of fact to be determined from the totality of all the circumstances. *United States v. Marin*, *supra*, 761 F.2d at 433. The prosecution may show that permission to search was obtained from a third party who possessed common authority over the premises sought to be searched, such as a wife who lives in a residence with her husband. *Id.*

Here, there is no question that Mrs. Soto lived at 3517 West 38th Street with Mr. Soto. Thus, she had the authority to consent to a search of the house and garage located at that address. Further, the government has presented evidence that the consent form was orally translated into

Spanish for Mrs. Soto by Agent Rodriguez. The government has also presented testimony that the agents speaking with Mrs. Soto did not draw their guns, threaten her with arrest, or otherwise coerce her into signing the consent form. While Mrs. Soto may have been upset by the presence of the agents, the knowledge of her husband's arrest, and the request to search the house and garage, absent coercion, the voluntariness of her consent is not overcome by the fact that she may have been upset. *United States v. Marin, supra,* 761 F.2d at 434. While Mrs. Soto testified on direct examination that she had not previously seen the consent form, on cross-examination she acknowledged that the signature on the form was hers. Further, she acknowledged that "maybe" she had told Detective Rodriguez that it was all right for the agents to search the house. I conclude that in light of the totality of the circumstances, the government proved that Mrs. Soto's consent to search the house and garage located at 3517 West 38th Street was voluntarily given.[4]

Next, Ms. Zafiro and Mr. Martinez challenged the search of their apartment at 1925 South 51st Court, made pursuant to the search warrant issued by Magistrate Balog on February 22, 1989. They argue that the search warrant should be quashed.

"A magistrate's issuance of a search warrant based on probable cause will be upheld 'so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a

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[4] Mr. Garcia has presented no evidence that he lived at 3517 West 38th Street. Since he had no common authority over those premises, he had no standing to object to the search conducted there.

search would uncover evidence of wrongdoing. . . . ' " *United States v. Griffin,* 827 F.2d 1108, 1111 (7th Cir. 1987) (quoting *Illinois v. Gates,* 462 U.S. 213, 236, 76 L.Ed.2d 527 (1983) (quoting *Jones v. United States,* 362 U.S. 257, 271, 4 L.Ed.2d 697 (1960))). The Seventh Circuit has noted that:

> "[A] magistrate's determination of probable cause is to be 'given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense matter, does not allege specific facts and circumstances from which the magistrate could reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated.' "

United States v. Griffin, supra, 827 F.2d at 1111 (quoting *United States v. Prichard,* 745 F.2d 1112, 1120 (7th Cir. 1984) (quoting *United States v. Rambis,* 686 F.2d 620, 622 (7th Cir. 1982))). Whether the supporting affidavit is sufficiently reliable to support a determination of probable cause depends on the totality of the circumstances, and involves a consideration of the various indicia of reliability including the affiant's veracity and the basis of his knowledge set forth in the affidavit. *United States v. Griffin, supra,* 827 F.2d at 1111.

In this case, the affidavit was made by Thomas Bridges, a Chicago police detective assigned to the drug task force. In the affidavit he stated that the information he supplied was based both on direct knowledge and on information provided by other agents. This declaration in the affidavit provides sufficient indicia of reliability. *See United States v. Griffin, supra,* 827 F.2d at 1111 (observations of fellow officers of the government engaged in a

common investigation are plainly a reliable basis for a warrant applied for by one of their number). Further, the affidavit details the course of the investigation to the time the affidavit was made, including specific times, dates, and locations where the investigation and surveillance took place. The affidavit included the information that the package the box dropped at 1925 South 51st Court field-tested positive for cocaine. The defendants argue that because the box was dropped outside the second floor apartment, and the informant only indicated that a shipment of narcotics was to be made *to* the Martinez-Zafiro apartment, the affidavit does not present probable cause to believe that there would be other narcotics or evidence inside the apartment. I disagree. In this case, Magistrate Balog was required:

> "to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information,"

Illinois v. Gates, supra, 462 U.S. at 238, that there was a fair probability that evidence of a conspiracy to distribute narcotics would be found in the second floor apartment of 1925 South 51st Court in Cicero, Illinois. I conclude that under the totality of the circumstances of this case, Agent Bridges' affidavit provided the required basis for concluding that probable cause to search the second floor apartment at 1925 South 51st Court in Cicero existed.[5]

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[5] Defendants also claim that the search warrant was not valid because the text of the warrant lists the premises as 1925

(Continued on following page)

Defendants' last argument is that the cocaine located in the box dropped by Messrs. Soto and Garcia should be suppressed. Defendants contend that the agents seized the box containing the cocaine from the apartment before the agents arrested the four defendants. However, the government has presented credible evidence that the box was dropped outside the apartment by Messrs. Garcia and Soto.[6]

Once the box was dropped in the hallway by Messrs. Soto and Garcia, its search by government agents was lawful because the box was voluntarily relinquished by Messrs. Soto and Garcia. *Abel v. United States,* 362 U.S. 217, 241 (1960). The test for whether Messrs. Soto and Garcia abandoned the box is whether they retained any reasonable expectation of privacy in the object, based on objective standards. *United States v. Jones,* 707 F.2d 1169,

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(Continued from previous page)

South 51st Court, Second Floor Apartment, Chicago, Illinois, rather than Cicero, Illinois, as the caption of the search warrant reads, and as is indicated in the affidavit attached to the warrant. Given the fact that the affidavit and the caption both contain the correct address, I conclude that the fact that the address in the text of the affidavit is given as Chicago, Illinois, was merely a typographical error that does not affect the validity of the warrant. *See United States v. Bentley,* 825 F.2d 1104, 1109 (7th Cir. 1987) (upholding a search of an office not listed in the warrant because the warrant listed the wrong room number, and noting that officers did what they should have done in searching the right office rather than the one with the number mistakenly given in the warrant).

[6] I found Mr. Soto's testimony that the box was inside the apartment, on the kitchen table, when first seen by agents not to be credible.

1172 (10th Cir. 1983). Here, Mr. Soto and Mr. Garcia discarded the box in the hallway, and fled. Their objective acts manifested a clear intent to relinquish any expectation of privacy in the box. *Id.* at 1172-73. "There can be nothing unlawful in the government's appropriation of such abandoned property." *Abel v. U.S., supra,* 362 U.S. at 241.

Conclusion

I recommend that the defendants' motion to quash the arrests of Mr. Martinez and Ms. Zafiro be denied. I recommend that the defendants' motion to suppress the evidence seized during the search of the defendants incident to their arrests be denied. I recommend that the defendants' motions to suppress the evidence seized during the search of the premises at 3517 West 38th Street, Chicago, Illinois, be denied. I recommend that the defendants' motion to quash the search warrant issued by Magistrate Balog on February 22, 1989, authorizing a search of the second floor apartment at 1925 South 51st Court, Cicero, Illinois, be denied. I recommend that the defendants' motion to suppress the box of cocaine dropped in the stairwell of the 1925 South 51st Court apartment building be denied.

/s/ Elaine E. Bucklo
ELAINE E. BUCKLO
United States Magistrate

Dated: August 4, 1989.

Written objections to any finding of fact, conclusion of law, or the recommendation for disposition of this matter

must be filed with the Honorable Nicholas J. Bua within ten (10) days after service of this Report and Recommendation. *See* Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

Copies have been mailed to:

STEPHEN CROCKER
Assistant U.S. Attorney
219 South Dearborn Street
Chicago, IL 60604

Attorney for Plaintiff

THOMAS J. ROYCE
431 South Dearborn Street
Suite 1402
Chicago, IL 60605

STEVEN R. DECKER
221 North LaSalle Street
Suite 1164
Chicago, IL 60601

LELAND SHALGOS
29 South LaSalle Street
Suite 440
Chicago, IL 60603

JOSEPH SIB ABRAHAM
P.O. Box D
El Paso, TX 79951

Attorneys for Defendants

Minute Order Form
(rev. 3/88e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	JUDGE BUA	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	89 CR 165-1,2,3, & 4	Date	August 7, 1989
Case Title	U.S.A. -vs- GLORIA ZAFIRO, et al.		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry:]

Defendant Jose Martinez's[2] motion to sever or for a separate jury trial is denied. Defendant Martinez's oral motion to bar jury during testimony of defendant Zafiro is denied as moot. Defendant Martinez's motion in limine and defendant Zafiro's oral motion in limine are entered and continued for the reasons stated in open court.

(3) ☐ Filed motion of [use listing in "MOTION" box above].
(4) ☐ Brief in support of motion due _____.
(5) ☐ Answer brief to motion due _____ Reply to answer brief due _____.
(6) ☐ Hearing / ☐ Ruling on _____ set for _____ at _____.
(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.
(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.
(9) ☐ Trial ☐ set for ☐ reset for _____ at _____.
(10) ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____.
(11) ☐ This case is dismissed ☐ with ☐ without prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)
(12) ☐ (For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.)

	No notices required.	FD-1 RECEIVED FOR... 89 AUG -7 PM 3:31	6	number of notices
	Notices mailed by judge's staff.		AUG 16 1989	date docketed
	Notified counsel by telephone.		ah	docketing dpty. initials
X	Docketing to mail notices.			date mld. notices
	Mail AO 450 form.			
	Copy to judge/magistrate.			
	courtroom deputy's initials: aew	Date/time received in central Clerk's Office		mailing dpty. initials

Document # 83

62

United States District Court

NORTHERN **District of** ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA

V.

GLORIA ZAFIRO

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 89 CR 165-1

(Name of Defendant)

THOMAS J. ROYCE
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[X] was found guilty on count(s) One (1) and acquitted as to counts 2, 3 & 4 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC 846	Conspiracy to possess with intent to distribute cocaine, heroin, and marijuana	1

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) Two(2), Three (3), and Four (4) , and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[X] It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00 , which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's
Soc. Sec. Number:

354-50-4133

November 16, 1989
Date of Imposition of Sentence

Defendant's
mailing address:

/s/ Nicholas J. Bua
Signature of Judicial Officer

Chgo. Metropolitan
Correctional Center
71 West Van Buren
Chicago, IL 60605

NICHOLAS J. BUA,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

November 16, 1989
Date

Defendant's
residence address:

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS .

This term consists of terms of ONE-HUNDRED-FIFTY-ONE (151) MONTHS on Counts One, with credit for time served from February 22, 1989.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

[ ] at _____ a.m. / p.m. on _____ .

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at

_____ , with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS .

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

DEFENDANT'S MOTION TO ADOPT MOTIONS OF CO-DEFENDANTS

NOW COMES defendant JOSE MARTINEZ, by and through his attorney, STEVEN R. DECKER, and moves this Court to permit the defendant JOSE MARTINEZ, to adopt all motions and supporting Memoranda of Law filed by co-defendants, Gloria Zafiro, Alfonso Sota and Salvador Garcia, in this action and in support thereof states as follows:

1. By this motion, defendant JOSE MARTINEZ, seeks to adopt all motions in supporting Memoranda of Law filed in this action by any of the co-defendants in order to avoid duplication of effort by the Court, United States Attorney's office and other defense counsel.

2. The interest of justice will best be served by the granting of this motion and defendant does not see anyway in which the Government can be prejudice [sic] thereby.

WHEREFORE, for the forgoing reasons, defendant respectfully requests this that Honorable Court enter an order granting the relief requested in this motion.

Respectfully submitted,

/s/ Steven R. Decker
STEVEN R. DECKER, attorney
for defendant, Jose Martinez.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 89-CR-165-2
	)	
-vs-	)	Judge Nicholas Bua
	)	
JOSE MARTINEZ,	)	
	)	
Defendant.	)	

MOTION TO SEVER OR IN THE ALTERNATIVE REQUEST FOR SEPARATE JURY TRIAL

NOW COMES defendant, JOSE MARTINEZ, by and through his attorney, STEVEN R. DECKER, and pursuant to Fed. R. Crim. P. 14. does hereby request that this Court grant a severance to defendant MARTINEZ from a trial with co-defendant Gloria Zafiro. In support thereof defendant MARTINEZ states as follows:

1. Defendant JOSE MARTINEZ, having recently concluded the hearing on his motion to suppress became aware, for the first time, that his co-defendant, Gloria Zafiro, at the time of trial will testify in her own behalf, and make statements which will implicate defendant Martinez.

2. Defendant does not desire to testify at his trial, and after his unsuccessful proffer of his testimony to the Government, will be effectively estopped from testifying in his own behalf.

3. Although defendant Martinez acknowledges that some "finger-pointing is an acceptable cost of the joint trial", *United States vs. Buljedsic*, 808 F.2d 1260, 1263 (7th

Cir.), *cert. denied*, 108 S. Ct. 67 (1987), in this case only Zafiro will be doing the "finger-pointing", and her finger is pointed at defendant Marintez [sic].

4. Alternatively, the defendant Martinez submits that should the Court reject his motion to sever the defendant, he respectfully requests that the Court impanel a separate (illegible) to decide only defendant Martinez's guilt or innocence, and his jury could be excluded from the trial during the anticipated "finger-pointing" of co-defendant Zafiro.

WHEREFORE, defendant Martinez, respectfully requests that this Honorable Court grant his motion to sever or in the alternative to select a separate jury.

Respectfully submitted,

/s/ Steven R. Decker
STEVEN R. DECKER, attorney
for defendant, Jose Martinez.

Minute Order Form
(rev. 3/88e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	BUA	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	89 CR 165-2	Date	16 Aug 89
Case Title	U.S. v. JOSE MARTINEZ		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

Sent for Microfilming
AUG 18 1989
Filmed on AUG 21 1989

72

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry:]

Jury deliberation begins. Jury returns verdict of guilty on all counts.

Court enters judgment of guilty on counts 1,2,3, and 4. Trial ends.

Cause referred to probation department for presentence investigation.

Sentencing set for November 21, 1989 at 9:45 AM. Defendant to file ~~post trial motions by 15 Sep 89, and government to answer by 29 Sep 89.~~

(3) ☐ Filed motion of [use listing in "MOTION" box above].
(4) ☐ Brief in support of motion due _____.
(5) ☐ Answer brief to motion due _____ Reply to answer brief due _____.
(6) ☐ Hearing ☐ Ruling on _____ set for _____ at _____.
(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.
(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.
(9) ☐ Trial ☐ set for ☐ reset for _____ at _____.
(10) ☐ ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____.
(11) ☐ This case is dismissed ☐ with ☐ without prejudice and without costs ◆ by agreement ☐ pursuant to
☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)
(12) ☐ (For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.)

☐ No notices required.	RECEIVED ED-FINO 89 AUG 17 AM 4	4	number of notices
☐ Notices mailed by judge's staff.		AUG 18 1989	date docketed
☐ Notified counsel by telephone.		sh	docketing dpty. initials
☒ Docketing to mail notices.		AUG 18 1989	date mld. notices
☐ Mail AO 450 form.		SJ	mailing dpty. initials
☐ Copy to judge/magistrate.			
courtroom deputy's initials: fda	Date/time received in central Clerk's Office		Document # 99

Minute Order Form
(rev. 3/88e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	BUA	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	89 CR 165-2	Date	September 18, 1989
Case Title	U.S. v. JOSE MARTINEZ		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry:]

Defendant's motion for a new trial is denied.

(3) ☐ Filed motion of [use listing in "MOTION" box above].

(4) ☐ Brief in support of motion due _____.

(5) ☐ Answer brief to motion due _____ Reply to answer brief due _____.

(6) ☐ Hearing ☐ Ruling on _____ set for _____ at _____.

(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.

(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.

(9) ☐ Trial ☐ set for ☐ reset for _____ at _____.

(10) ☐ ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____.

(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(12) ☐ (For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.)

☐ No notices required.
☐ Notices mailed by judge's staff.
☐ Notified counsel by telephone.
☒ Docketing to mail notices.
☐ Mail AO 450 form.
☐ Copy to judge/magistrate.

courtroom deputy's initials: fdl

RECEIVED ED-1 89 SEP 18 PM 12:23

Date/time received in central Clerk's Office

4 — number of notices

SEP 19 1989 — date docketed

sh — docketing dpty. initials

SEP 19 1989 — date mld. notices

sh — mailing dpty. initials

Document # 111

73

United States District Court

NORTHERN **District of** ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA

V.

JOSE MARTINEZ

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 89 CR 165-2

Steven Decker
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____ .

[X] was found guilty on count(s) one, two, three, and four after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC 846	Conspiracy	1
21 USC 841(a)(1)	Possession with intent to distribute controlled substances	2,3,4

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[X] It is ordered that the defendant shall pay to the United States a special assessment of $ 200.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's
Soc. Sec. Number:

526-33-6127

November 21, 1989
Date of Imposition of Sentence

Defendant's
mailing address:

/s/ Nicholas J. Bua
Signature of Judicial Officer

Metropolitan
Correctional Center
Chicago, Illinois

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

Defendant's
residence address:

November 21, 1989
Date

3102 East Avenue

Berwyn, Illinois

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED SIXTY-TWO (262) MONTHS.

It is further ordered that defendant be given credit for time already served.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

[ ] at _____ a.m. / p.m. on _____.

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS .

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GLORIA ZAFIRO, JOSE MARTINEZ, ALFONSO SOTO and SALVADOR GARCIA, Defendants.	)	No. 89 CR 165 JUDGE BUA (Filed Apr. 25, 1989)

MOTION TO SEVER DEFENDANT SOTO FROM DEFENDANT GARCIA

Now comes the defendant, ALFONSO SOTO, by his attorney, LELAND SHALGOS, pursuant to Rules 8B and 14 of the Fed. R. Crim. P. and moves to sever the aforementioned defendants' cases from each other. In support of said motion, defendant states as follows:

1. Alfonso Soto and Salvador Garcia were arrested with Gloria Zafiro and Jose Martinez and charged with sundry violations of Title 21 U.S.C. 841(a) (1) and 846 on February 22, 1989.

2. Subsequent to the aforementioned defendants' arrest, all four defendants were indicted by the Special May 1987 Grand Jury and charged together in the aforementioned indictment as follows:

a) Alfonso Soto – Count 1: Conspiracy to distribute cocaine; Count 5: possession with intent to distribute 25 kilograms of cocaine; Count 6: possession with intent to distribute 3.5 kilograms of cocaine.

b) Salvador Garcia – Count 1: Conspiracy to distribute cocaine; Count 5: possession with intent to distribute 25 kilograms of cocaine.

3. The prosecution alleges on information and belief (see attached search warrant/affidavit attached hereto as Exhibit 1) that Soto visited the home of Zafiro and Martinez on February 22, 1989, left that residence within a short period of time and went to 3517 W. 38th Street, Chicago, Illinois where he met with Garcia. Subsequently, Soto then returned to the Zafiro/Martinez residence where he was arrested along with Garcia while carrying a box containing 25 kilograms of cocaine.

4. Alfonso Soto's defense that he will testify to in the aforementioned indictment is that he had no knowledge of the contents of the box that he was carrying and that he was simply assisting Garcia at Garcia's request relative to delivering the box to the occupants of the home located at 1925 S. 51st Court, Cicero, Illinois (the Zafiro/Martinez residence). Additionally, Soto will testify to the aforementioned by specifically inculpating both Garcia and the unknown occupants of the apartment wherein Zafiro and Martinez resided.

5. The attorney for Soto has communicated with the attorney for Garcia, Joseph Sib Abraham, and has been advised that Soto's defense is precisely the opposite of and inconsistent with Garcia's, *vis.* that Garcia will testify that Soto performed the aforementioned acts as is alleged by the government in their affidavit for search and that he, Garcia, had no knowledge of the contents of the box with the cocaine.

6. The defense of Garcia and Soto conflict to the point of being irreconcilable and mutually exclusive and inconsistent because each defendant accuses the other of having performed acts which demonstrate culpability. See *United States v. Shively*, 715 F.2d 260 (7th Cir. 1983); *United States v. Oglesby*, 764 F.2d 1273 (7th Cir. 1985). As a consequence, the defenses that each defendant is going to interpose are antagonistic to one another and as a consequence will effectively deny each other a fair trial.

WHEREFORE, the defendant, ALFONSO SOTO, requests this Honorable Court to sever the matter from that of Salvador Garcia.

Respectfully submitted,

ALFONSO SOTO

BY: /s/ Leland Shalgos
HIS ATTORNEY

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	No. 89 CR 165 -3
Plaintiff,	)	
	)	JUDGE
v.	)	NICHOLAS
	)	BUA
ALPHONSO SOTO	)	
Defendant.	)	(Filed Sept. 15,
	)	1989)
	)	
	)	

MOTION FOR A NEW TRIAL

Now comes Alphonso Soto through his attorney, Leland Shalgos, requests this Honorable court pursuant to Rule 33, F.R. Crim. P. to grant defendant a new trial. In support thereof, defendant states:

1. The court erred when it denied the defendant's discovery request for notice of evidence of other crimes (Rule 404 (B) F. R. Crim. P.) Further, when the evidence was unexpectedly received, error occurred when the court denied defendant's objection to the admission of this Rule 404 (B) evidence on the grounds that it violated Rule 403 Fed. R. Crim. P.

2. The court erred when it failed to grant the defendant a severance from co-defendant, Salvador Garcia, because of the fact that Garcia's defense was antagonistic to Soto's and vice versa.

Respectfully submitted,

ALPHONSO SOTO
BY: /s/ Leland Shalgos
HIS ATTORNEY

LELAND SHALGOS
29 S. LaSalle Street
Suite 440
Chicago, Illinois 60603
(312) 782-8520

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GLORIA ZAFIRO, JOSE MARTINEZ, ALFONSO SOTO, and SALVADOR GARCIA, Defendants.	)	No. 89 CR 165 Honorable Nicholas J. Bua, Presiding

ORDER

Following their indictment on drug conspiracy charges, defendants Gloria Zafiro, Jose Martinez, Alfonso Soto, and Salvador Garcia have filed a variety of pretrial motions. This court cannot decide some of defendants' motions without first resolving certain factual disputes. For this reason, the court has instructed Magistrate Bucklo to conduct an evidentiary hearing concerning defendants' motions to quash certain arrests, quash a search warrant, and suppress certain evidence seized by government agents. Having referred these motions to the magistrate, the court will now rule on the remainder of defendants' motions.

I. Motions to Adopt

Martinez, Soto, and Garcia have moved to adopt the pretrial motions of their codefendants. To the extent that any defendant's motion applies to any or all codefendants, the court grants the three defendants' motions to adopt.

II. Discovery Motions

Pursuant to Fed. R. Crim. P. 16, Martinez moves for disclosure of all statements that the government seeks to attribute to him. The government responds that it has satisfied and will continue to satisfy its obligations under Rule 16. Based on the government's representations, this court denies Martinez's discovery motion.

In addition to Martinez's request for disclosure, Soto and Garcia have filed a 23-page discovery motion. They seek to discover a wide assortment of documents and information. Without addressing every aspect of the lengthy motion filed by Soto and Garcia, the government asserts that it has fully complied with the discovery requirements imposed by Rule 16, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The government also points out that several of the requests made by Soto and Garcia fall outside the scope of Rule 16. Specifically, the government objects to defendants' requests for the identity of confidential informants, a list of government witnesses, and evidence in the government's possession that tends to impeach defense witnesses.

The government acknowledges that it relied on a tip from a confidential informant when it initiated its investigation of defendants. Nonetheless, the government insists that it should not have to disclose the identity of its

confidential informant. This court agrees with the government's position. The government has indicated that it does not intend to call the informant as a witness at trial. Moreover, the informant did not witness any of the crimes with which defendants are charged; he merely provided the tip that launched the investiagiton. Thus, disclosure of the informant's identity will not appreciably assist defendants in preparing for trial. Under those circumstances, the government's interest in maintaining the confidentiality of its informant's identity outweighs defendants' need for disclosure. *See United States v. Bakhoury*, 819 F.2d 1415, 1424-25 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 749 (1988).

The government has also balked at defendants' request for a list of prospective government witnesses. As the government notes, the Federal Rules of Criminal Procedure do not entitle a defendant to a list of prospective witnesses. *United States v. Bouye*, 688 F.2d 471, 473-74 (7th Cir. 1982). Consequently, this court will not require the government to produce such a witness list. Of course, once Soto supplies the government with a list of witnesses who will testify in support of Soto's alibi defense, the government will have to provide Soto with a list of witnesses who will tend to rebut Soto's alibi. *See* Fed. R. Crim. P. 12.1(a), (b).

The government's final objection concerns defendants' request for evidence tending to impeach defense witnesses. The Federal Rules of Criminal Procedure do not require the government to disclose impeachment evidence. In fact, according to the Seventh Circuit, "there is a serious question whether a district judge is empowered

to require discovery of impeachment evidence" by federal criminal defendants. *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985). Because this court lacks clear authority to mandate discovery of impeachment evidence, the court will not order the government to disclose such evidence in the instant case.

For the most part, the government appears to have complied with defendants' reasonable discovery requests. Nonetheless, the government has not indicated whether it has instructed its agents to preserve the notes they made while investigating defendants. Given the government's silence on this issue, the court will enter an order directing the government to take steps to preserve its agents' notes. In all other respects, however, the court denies the discovery motion filed by Soto and Garcia.

III. Motions to Sever

Shortly before making arrests in this case, government agents accosted Soto and Garcia while the two defendants were carrying a box into the building where Zafiro and Martinez reside. When the government agents identified themselves, Soto and Garcia dropped the box and fled to the apartment occupied by Zafiro and Martinez. The government later determined that the box contained cocaine. At trial, Soto and Garcia intend to point accusatory fingers at each other. Each defendant claims that he did not own the box or know of its contents. Each defendant also asserts that he was simply helping to carry the box at the request of the other defendant. Soto and Garcia characterize their trial strategies as "mutually antagonistic defenses." Based on this characterization,

both defendants have moved to sever their cases from each other pursuant to Fed. R. Crim. P. 14.

A court should resort to severance only when the defenses of multiple defendants would produce inevitable prejudice in the context of a joint trial: "Unless the defenses are so inconsistent that the *making* of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense *precludes* acquittal of other defendants, it is not necessary to hold separate trials." *United States v. Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.) (emphasis in original), *cert. denied*, 108 S. Ct. 67 (1987). The circumstances that might warrant severance do not exist in the instant case. In evaluating the government's case against Soto and Garcia, a jury could accept the defense offered by one defendant while concluding that the government did not sufficiently establish the guilt of the other defendant. For this reason, the court does not regard the defenses asserted by Soto and Garcia as mutually antagonistic. The court acknowledges that a joint trial will probably produce a strategic conflict between Soto and Garcia. Nonetheless, "[f]inger-pointing is an acceptable cost of the joint trial and at times is even beneficial because it helps complete the picture before the trier of fact." *Id.* For all their "finger-pointing," Soto and Garcia do not plan to assert mutually antagonistic defenses. Therefore, the court denies the two defendants' motions to sever.

CONCLUSION

For the foregoing reasons, the court grants the motions to adopt filed by Martinez, Soto, and Garcia. The court also orders the government to instruct its agents to preserve the notes they made while investigating defendants. In all other respects, however, the court denies defendants' discovery motions. Finally, the court denies the motions to sever filed by Soto and Garcia.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
Nicholas J. Bua
Judge, United States District Court

Dated: July 11, 1989

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 89-CR-165-2
-vs-	)	Judge Nicholas Bua
JOSE MARTINEZ,	)	(Filed Sep. 14, 1989)
Defendant.	)	

MOTION FOR A NEW TRIAL

NOW COMES the defendant, JOSE MARTINEZ, by and through his attorney, STEVEN R. DECKER, and pursuant to Federal Rules of Criminal Procedure, Rule 33, moves this Honorable Court to grant the defendant a new trial. In support hereof the following is stated:

1. Following a jury trial the defendant, JOSE MARTINEZ, was found guilty of counts 1, 2, 3, and 4 of the indictment which charged the defendant with conspiracy in violation of Title 21, U.S. Code, Sec. 846; and the offense of possession with intent to distribute, in violation of Title 21, U.S. Code, Sec. 841 (a)(1).

2. The defendant respectfully submits that he was denied a fair trial in that he was not proved guilty of any offense beyond a reasonable doubt, and that furthermore the defendant was denied due process and equal protection under the laws.

3. The defendant furthermore states that he was denied a fair trial, in that prior to trial, his motion to quash arrest and to suppress evidence, as well as his

motion to quash the search warrant, was denied, following a hearing by Magistrate Bucklo.

4. The defendant furthermore submits that this Honorable Court denied the defendant a fair trial by this Court refusal to grant the defendant's motion to sever in that defendant MARTINEZ indicated that he anticipated that the testimony of the co-defendant, Gloria Zafiro, would implicate the defendant. At the trial in this matter, defendant MARTINEZ, did not testify, however, co-defendant Zafiro testified to information which was damaging to the defendant, which would not have been able to be proved by the Government, but for the testimony of co-defendant Zafiro, including evidence that MARTINEZ brought a suitcase into the apartment the night before the arrest.

5. The defendant furthermore submits that he was denied a fair trial by the Government's statement, in their opening statement to the jury: that our surveilliance [sic] was set up on the apartment at 1925 S. 51st Court, after certain DEA agents spoke to a confidential informant whose identity will be protected. This error was further compounded when the Government's first witness, Lt. Maurice Daly, stated that police agents use confidental [sic] informants, who are citizens who supply information, but for reasons of confidentality, [sic] to protect their life, their names are not revealed. In the case at bar there was no evidenced [sic] introduce [sic] to show that the defendant at any time ever threaten [sic] physical violence against any individual, nor did the defendant show the potential for violence. Additionally, during the testimony of Lt. Daly, the defendant was further denied a fair trial by the statement that they were expecting a three

hundred pound delivery of cocaine. The defendant was furthermore denied a fair trial by the testimony of the next witness, Maria Vera, who was allowed to testify, on cross-examination by Zafiro's attorney, regarding her sexual relationship with defendant Jose Martinez.

6. Moreover, defendant MARTINEZ objects to certain testimony by agent Rodriguez, which denied him a fair trial, including the agent's opinion and interpretation of a certain card which was on defendant's person at the time of his arrest. The card, was used to show evidence of other crimes for which the defendant was not charged. Additionally, the defendant objects to testimony of agent Rodriguez, wherein he stated "that there is never an innocent party" around these narcotic transactions, although the defendant MARTINEZ acknowledges that the court did sustain our objection to that statement. The defendant furthermore submits that error occurred during the closing arguments when attorney Royce, on behalf of defendant Zafiro, stated that "both Maria Vera and Gloria were used and abused by Jose Martinez." Moreover, during the Government's rebuttal, the defendant was denied a fair trial by the statement that "the agents can't tell you about prior conspiratorial conversations, because they weren't inside the apartment, but they did occur." This statement, was not supported by the evidence, and as such it denied defendant MARTINEZ a fair trial.

7. Additionally defendant submits that this Honorable Court erred in denying the defendant's motion, pursuant to Federal Rules of Criminal Procedure, Rule 29, for a judgment of acquittal prior to the time the case was submitted to the jury.

8. Defendant JOSE MARTINEZ, furthermore requests that a new trial be granted based upon each and every objection made by defendant JOSE MARTINEZ which was overruled, based upon each and every objection made by the Government which was sustained by the Court, and for each and every other motion for mistrial which was made by the defendant which was denied by the Court.

WHEREFORE, defendant JOSE MARTINEZ, respectfully requests that this Honorable Court grant him a new trial.

Respectfully submitted,

/s/ Steve R. Decker
STEVEN R. DECKER,
attorney on behalf of
defendant, Jose Martinez.

Minute Order Form
(rev. 3/88e)

UNITED STATES DISTRI[C]T COURT, NORTHERN DISTRICT OF ILLI[N]OIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	BUA	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	89 CR 165-3	Date	September 18,1989
Case Title	U.S. v. ALPHONSO SOTO		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry:]

Defendant's motion for a new trial is denied.

(3) ☐ Filed motion of [use listing in "MOTION" box above].

(4) ☐ Brief in support of motion due _____.

(5) ☐ Answer brief to motion due _____ Reply to answer brief due _____.

(6) ☐ Hearing / ☐ Ruling on _____ set for _____ at _____.

(7) Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.

(8) Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.

(9) Trial ☐ set for ☐ reset for _____ at _____.

(10) ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____.

(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to
☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(12) ☐ (For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.)

☐ No notices required.	RECEIVED FED 1 89 SEP 18 PM 12: 2[illegible]	4	number of notices
☐ Notices mailed by judge's staff.		SEP 19 1989	date docketed
☒ Notified counsel by telephone.			docketing dpty. initials
☐ Docketing to mail notices.		SEP 19 1989	date mld. notices
☐ Mail AO 450 form.			mailing dpty. initials
☐ Copy to judge/magistrate.			
courtroom deputy's initials	Date/time received in central Clerk's Office		Document # 110

95

United States District Court

NORTHERN **District of** ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA

V.

ALFONSO SOTO

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 89 CR 165-3

Kenneth L. Cunniff
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____ .

[X] was found guilty on count(s) one, five and six after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC 846	Conspiracy	1
21 USC 841(a)(1)	Possession with intent to distribute Cocaine	5 and 6

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ , and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[X] It is ordered that the defendant shall pay to the United States a special assessment of $ 150.00 , which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's
Soc. Sec. Number:

319-64-7721

Defendant's
mailing address:

3517 West 38th Street
Chicago, IL

Defendant's
residence address:

Metropolitan
Correctional Center
Chicago, IL 60605

December 14, 1989
Date of Imposition of Sentence

/s/ Nicholas J. Bua
Signature of Judicial Officer

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

December 14, 1989
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS .

IT IS ORDERED that defendant be given credit for time already served.

[X] The Court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

[ ] at _____ a.m. / p.m. on _____ .

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS .

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

_____

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. 89 CR 165
v.	)	JUDGE BUA
GLORIA ZAFIRO, JOSE MARTINEZ, ALFONSO SOTO and SALVADOR GARCIA, Defendants.	)	(Filed Apr. 25, 1989)

MOTION TO SEVER DEFENDANT SOTO FROM DEFENDANT GARCIA

Now comes the defendant, SALVADOR GARCIA, by his attorney, JOSEPH SIB ABRAHAM, pursuant to Rules 8B and 14 of the Fed. R. Crim. P. and moves to sever the aforementioned defendants' cases from each other. In support of said motion, defendant states as follows:

1. Alfonso Soto and Salvador Garcia were arrested with Gloria Zafiro and Jose Martinez and charged with sundry violations of Title 21 U.S.C. 841(a) (1) and 846 on February 22, 1989.

2. Subsequent to the aforementioned defendants' arrest, all four defendants were indicted by the Special May 1987 Grand Jury and charged together in the aforementioned indictment as follows:

a) Alfonso Soto – Count 1: Conspiracy to distribute cocaine; Count 5: possession with intent to distribute 25 kilograms of cocaine; Count 6:

possession with intent to distribute 3.5 kilograms of cocaine.

b) Salvador Garcia – Count 1: Conspiracy to distribute cocaine; Count 5: possession with intent to distribute 25 kilograms of cocaine.

3. The prosecution alleges on information and belief (see attached search warrant/affidavit attached hereto as Exhibit 1) that Soto visited the home of Zafiro and Martinez on February 22, 1989, left that residence within a short period of time and went to 3517 W. 38th Street, Chicago, Illinois where he met with Garcia. Subsequently, Soto then returned to the Zafiro/Martinez residence where he was arrested along with Garcia while carrying a box containing 25 kilograms of cocaine.

4. Salvador Garcia's defense to which he will testify in the aforementioned indictment is that he had no knowledge of the contents of the box that he was carrying and that he was simply assisting Soto at Soto's request relative to delivering the box to the occupants of the home located at 1925 S. 51st Court, Cicero, Illinois (the Zafiro/Martinez residence). Additionally, Garcia will testify to the aforementioned by specifically inculpating both Soto and the unknown occupants of the apartment wherein Zafiro and Martinez resided.

5. The attorney for Garcia has communicated with the attorney for Soto, Leland Shalgos, and has been advised by Shalgos that Garcia's defense is precisely the opposite of Soto's, *vis.* it is Soto's contention that it was Garcia and not Soto who performed the acts as alleged in the attached search warrant prepared by the government.

6. The defenses of Garcia and Soto conflict to the point of being irreconcilable and mutually exclusive and inconsistent because each defendant accuses the other of having performed acts which demonstrate culpability. See *United States v. Shively*, 715 F.2d 260 (7th Cir. 1983); *United States v. Oglesby*, 764 F.2d 1273 (7th Cir. 1985). As a consequence, the defenses that each defendant is going to interpose are antagonistic to one another and as a consequence will effectively deny each other a fair trial.

WHEREFORE, the defendant, SALVADOR GARCIA, requests this Honorable Court to sever the matter from that of ALFONSO SOTO.

Respectfully submitted,

SALVADOR GARCIA

BY: /s/ illegible
HIS ATTORNEY

Minute Order Form
(rev. 3/88e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	BUA	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	89 CR 165-4	Date	August 16, 1989
Case Title	U.S. v. SALVADOR GARCIA		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

Sent for Microfilming

AUG 18 1989

AUG 21 1989

Filmed on

103

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry:]

Jury deliberation begins. Jury returns verdict of guilty on all counts. Court enters jury of guilty as to counts 1 and 5. Trial ends. Cause referred to probation department for presentence investigation. Sentencing is set for November 28, 1989 at 9:45 AM. Defendant to file post trial motions by 15 Sep 89, and government to file answer by 29 Sep 89.

(3) ☐ Filed motion of [use listing in "MOTION" box above].
(4) ☐ Brief in support of motion due _____.
(5) ☐ Answer brief to motion due _____ Reply to answer brief due _____.
(6) ☐ Hearing / ☐ Ruling on _____ set for _____ at _____.
(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.
(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.
(9) ☐ Trial ☐ set for ☐ reset for _____ at _____.
(10) ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____.
(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)
(12) ☐ (For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.)

☐ No notices required.
☐ Notices mailed by judge's staff.
☒ Notified counsel by telephone.
☐ Docketing to mail notices.
☐ Mail AO 450 form.
☐ Copy to judge/magistrate.

courtroom deputy's initials: fda

ED-I
RECEIVED FOR DOCKETING
89 AUG 17 AM 8:50

Date/time received in central Clerk's Office

4 — number of notices
AUG 18 1989 — date docketed
sh — docketing dpty. initials
AUG 18 1989 — date mld. notices
mailing dpty. initials

Document # 101

United States District Court

NORTHERN **District of** ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA	**JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT**
V.	
SALVADOR GARCIA	Case Number 89 CR 165-4
(Name of Defendant)	Joseph Sib Abraham Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____ .

[X] was found guilty on count(s) one and five after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC 846	Conspiracy to possess with intent to distribute cocaine, heroin, and marijuana	1
21 USC 841(a)(1)	Possession with intent to distribute cocaine	5

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[X] It is ordered that the defendant shall pay to the United States a special assessment of $ 100.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's
Soc. Sec. Number:

546-90-1475

November 28, 1989
Date of Imposition of Sentence

Defendant's
mailing address:

/s/ Nicholas J. Bua
Signature of Judicial Officer

Metropolitan
Correctional Center
Chicago, IL

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

November 28, 1989
Date

Defendant's
residence address:

2604 Sea Breeze

El Paso, TX 77936

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS.

IT IS FURTHER ORDERED that defendant be given credit for time already served.

[X] The Court makes the following recommendations to the Bureau of Prisons: That defendant be incarcerated at Oxford, Wisconsin.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

[ ] at _____ a.m. / p.m. on _____.

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at

_____ , with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS .

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-3520, 89-3639,
89-3660, 89-3729

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GLORIA ZAFIRO, JOSE MARTINEZ,
SALVADOR GARCIA, and ALFONSO SOTO,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 165 – **Nicholas J. Bua,** *Judge.*

ARGUED JUNE 14, 1991 – DECIDED SEPTEMBER 26, 1991

BEFORE POSNER, MANION, and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* The four defendants were tried together by a jury for offenses involving cocaine and other illegal drugs, and all were convicted. José Martinez was sentenced to 262 months in prison and the three other defendants – Alphonso Soto, Salvador Garcia, and Gloria Zafiro – to 151 months each even though the jury had acquitted Zafiro of possession with intent to distribute and convicted her only of participating in, or aiding and abetting, conspiracy. The verdict does not distinguish between actual participation on the one hand and aiding

and abetting on the other. At first glance it might seem odd that there could be (as the cases hold there can be, *United States v. Galiffa*, 734 F.2d 306 (7th Cir. 1984)) separate crimes of conspiracy and of aiding and abetting a conspiracy – for would not the act of aiding and abetting make the aider and abettor a member of the conspiracy? Not necessarily. Suppose someone who admired criminals and hated the police learned that the police were planning a raid on a drug ring, and, hoping to foil the raid and assure the success of the ring, warned its members – with whom he had had no previous, or for that matter subsequent, dealings – of the impending raid. He would be an aider and abettor of the drug conspiracy, but not a member of it. *United States v. Lane*, 514 F.2d 22 (9th Cir. 1975). For the essence of conspiracy is agreement, and there is none in our hypothetical case.

Of the issues raised by the defendants on appeal only two have sufficient merit to warrant discussion. The first is whether the judge should have granted the motions of Martinez, Soto, or Garcia for severance of their trials; the second is whether a reasonable jury could have found Zafiro guilty beyond a reasonable doubt. The government's case was simple. The three male defendants were acquaintances and Zafiro was Martinez's girl friend. The defendants operated a business of distributing illegal drugs at two locations – Zafiro's apartment in Cicero, Illinois, and Soto's bungalow-with-detached-garage in Chicago. One day, government agents followed Soto and Garcia as they transported a large box in Soto's car from Soto's garage to Zafiro's apartment. The agents identified themselves as they followed the two up the stairs to the apartment. Soto and Garcia dropped the box and ran into

the apartment, closely followed by the agents, who found all four defendants in the living room. The box contained 55 pounds of cocaine. Another 20 pounds were found in a suitcase in a closet in Zafiro's apartment and in a car in Soto's garage. The car was registered to another girl friend of Martinez's; he had given the car to her as a present but she had never used it.

The basis of the motions for severance by Soto and Garcia was that their defenses were mutually antagonistic. Soto testified that he didn't know anything about any drug conspiracy: Garcia had asked him for a box and he had given it to him; he didn't discover what was in it until it was opened when they were arrested. Garcia did not testify but his lawyer argued in closing argument that it was Soto's box and Garcia had known nothing about it. The basis of Martinez's motion for severance was that Zafiro's defense was antagonistic to his own. Zafiro testified that she was just a girl friend. Martinez stayed in her apartment from time to time, kept some clothes there, and gave her small amounts of money. But when he asked her whether he could store a suitcase in her closet he did not tell her that it contained narcotics and she had no idea it did. Martinez did not testify but his lawyer argued that Martinez had not known that cocaine was going to be delivered to Zafiro's apartment or that the suitcase in the closet contained cocaine; after all, it wasn't his apartment.

The government denies that the defenses of these various defendants were mutually antagonistic but concedes that if they were the defendants would be entitled to separate trials. The government describes this as a case merely of "finger-pointing," which it considers critically

different from presenting mutually antagonistic defenses although as an original matter we might have thought that for codefendants to point the finger of guilt at each other was about as forthright a gesture of mutual antagonism as could be imagined. Rule 14 of the federal criminal rules allows severance if a defendant (or for that matter the government) would be "prejudiced" by a joint trial. There is nothing about mutual antagonism. There is nothing, either, to suggest that two defendants cannot be tried together if it is certain that one but not both committed the crime and the only uncertainty is which one – the government's idea of when mutually antagonistic defenses bar a joint trial.

True, a vast number of cases say that a defendant is entitled to a severance when the "defendants present mutually antagonistic defenses" in the sense that "the acceptance of one party's defense precludes the acquittal of the other defendant," *United States v. Keck*, 773 F.2d 759, 765 (7th Cir. 1985) (though *United States v. McPartlin*, 595 F.2d 1321, 1334 (7th Cir. 1979), denies this proposition), but not when the defendants are engaged merely in "finger-pointing." *United States v. Buljubasic*, 808 F.2d 1260, 1263 (7th Cir. 1987); *United States v. Emond*, 935F.2d 1511, 1514 (7th Cir. 1991). This formulation has become canonical. But we recall Justice Holmes's warning that to rest upon a formula is a slumber that prolonged means death. The fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid "the scandal and inequity of inconsistent verdicts." *Richardson v.*

Marsh, 481 U.S. 200, 210 (1987). Cf. *United States v. Buljubasic, supra*, 808 F.2d at 1263. The analogy of interpleader comes to mind, Fed. R. Civ. P. 22; also such joint-tort cases as *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948), and *Sindell v. Abbot Laboratories*, 26 Cal. 3d 588, 607 P.2d 924 (1980). And as we said earlier we are not clear why the case in which the acceptance of one party's defense precludes the acquittal of the other defendant could not be regarded as a paradigmatic case of finger-pointing. We must dig beneath formulas.

As an original matter, persons charged in connection with the same crime should be tried separately only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants. Two situations might fit this bill. The first is that of a *complex* case with *many* defendants some of whom might be only *peripherally* involved in the alleged wrong-doing. The danger is that the bit players may not be able to differentiate themselves in the jurors' minds from the stars. Against that danger must be weighed the interest in trying all members of a conspiracy together so that the jury can get a complete picture and the government can save the expense of conducting multiple trials to break a single ring. This counterweight has invariably prevailed in the appellate cases, e.g., *United States v. Diaz*, 876 F.2d 1344, 1357-59 (7th Cir. 1989); *United States v. Moya-Gomez*, 860 F.2d 706, 754 (7th Cir. 1988); *United States v. L'Allier*, 838 F.2d 234, 241-42 (7th Cir. 1988); *United States v. Percival*, 756 F.2d 600, 610 (7th Cir. 1985) – we can find no recent reversals on this ground in this circuit, and only a couple in others. *United States v. Engleman*, 648 F.2d 473,

480-81 (8th Cir. 1981); *United States v. Salmon*, 609 F.2d 1172, 1175-77 (5th Cir. 1980). Either appellate courts have faith that the jury will obey instructions to consider the evidence regarding each defendant separately, or they defer to the district judge's judgment that a severance is not required. (They might defer as much to the opposite judgment, but such cases are underrepresented in an appellate sample. When the district judge grants a severance and the defendants go on to trial and are either acquitted or convicted, there is no possibility of appeal – well, almost none. If the government appeals the dismissal of an indictment or some other order made appealable by 18 U.S.C. § 3731, it may be permitted to challenge a severance under the doctrine of pendent appellate jurisdiction. *United States v. Maker*, 751 F.2d 614, 626 (3d Cir. 1984), allowed the government to challenge several severances in such a case, though without mentioning the doctrine or insisting on that close relatedness between the pendent and the independently appealable order that is a central element of the doctrine. *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988).)

A severance is more likely to be granted, and rightly so, when the defendants are not alleged to be members of a single conspiracy but instead are more loosely related to one another, for then the economies of a joint trial are fewer. *United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir. 1985); *United States v. Castro*, 829 F.2d 1038, 1045-46 (11th Cir. 1987). Such cases are rare, however, because different offenders can be joined in a single indictment only "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P.

8(b). That will ordinarily require that they be charged, or chargeable, either as coconspirators or as aiders and abettors of a conspiracy. *United States v. Velasquez, supra*, 772 F.2d at 1353.

The second type of case in which a joint trial is likely to throw the jury off the scent is where exculpatory evidence essential to a defendant's case will be unavailable – or highly prejudicial evidence unavoidable – if he is tried with another defendant. For example, *Bruton v. United States*, 391 U.S. 123 (1968), holds that a limiting instruction is insufficient to dispel the prejudice to a codefendant of being inculpated in a defendant's confession, and in such a case either redaction (*Richardson v. Marsh, supra*) or severance may be necessary. And there are cases in which a person would refuse to testify for a codefendant in a joint trial for fear of incriminating himself, yet if tried separately and convicted might thereafter be willing to testify and might give testimony exculpating the other defendant. *Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1979) (per curiam). The danger of course is that all the codefendants will want to be tried last, producing impasse.

However that issue be resolved, mutual antagonism, finger-pointing, and other manifestations or characterizations of the effort of one defendant to shift the blame from himself to a codefendant neither control nor illuminate the question of severance. If it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted – and in either case there would be a miscarriage of justice. We can imagine, if barely, a situation in which all but one of

the defendants try to place the blame on that one, so that he finds himself facing in effect a barrage of prosecutors – the official prosecutor and the other defendants' lawyers. Maybe a jury would be misled in such a case, and if the danger was substantial the district judge would be obliged to grant a severance. That is not this case. Each member of each pair of defendants (Soto-Garcia and Martinez-Zafiro) was accusing the other of being the drug dealer. In this symmetrical situation, each defendant had to defend himself against the prosecutor and one other defendant but at the same time had a live body to offer the jury in lieu of himself (or herself). Soto could say, "Don't convict me, convict Garcia," and Garcia's lawyer could say, "Don't convict my client, convict Soto." This was apt to be a more persuasive line than telling the jury to let everyone go, when the one thing no one could question is that the government had found 75 pounds of cocaine on premises connected with these defendants. No defendant was placed at a *net* disadvantage by being paired with another defendant whom he could accuse and who could accuse him in turn, let alone so disadvantaged as to be unable to obtain a fair trial. Cf. *United States v. Madison*, 689 F.2d 1300, 1306 (7th Cir. 1982). And the benefit of the joint trial went beyond the avoidance of duplication. The jury was given the full picture, which it would not have had if the trial had been limited to two of the four alleged conspirators (one from each pair, since neither Soto nor Garcia complain of being tried with Martinez and Zafiro, and Martinez does not complain of being tried with Soto and Garcia). Joint trials, in this as in many other cases, reduce not only the direct costs of litigation, but also error costs.

We remind the defense bar that they are not obliged to make futile arguments on behalf of their clients. The argument that a conviction should be reversed because the district judge failed to sever properly joined defendants for trial is nearly always futile even when the defendants can be said to be presenting mutually antagonistic defenses.

We come to the second question, that of Zafiro's guilt. There was no direct evidence against her. The drugs were found in her apartment – as was she. If that were all the evidence, we would reverse her conviction with directions to acquit. Our system of criminal justice does not permit the conviction of a person for the crime of aiding and abetting, or for the crime of conspiracy, merely because he is found on premises where illegal drugs are delivered or kept. *United States v. Atterson*, 926 F.2d 649, 656 (7th Cir. 1991). Suppose Martinez and Zafiro had been married, and, unbeknownst to his wife, Martinez stored narcotics in the house or received deliveries there, or both. Obviously with no knowledge of what was going on she could not be convicted of participating in a drug-dealing conspiracy with him. Nor could she be convicted of aiding and abetting her husband's drug dealing. The crime of aiding and abetting requires *knowledge* of the illegal activity that is being aided and abetted, a *desire* to help the activity succeed, and some *act* of helping. *United States v. Pino-Perez*, 870 F.2d 1230, 1235 (7th Cir. 1989) (en banc); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.). In our hypothetical case not one of the three elements would be present. If the wife did know what was going on but did nothing to help her husband, the second and third elements would be missing and

again she would have to be acquitted. Whether she could be convicted of conspiracy would depend on whether she could be found to have agreed to participate in her husband's illegal activity; again, mere knowledge of that activity would not be enough. *United States v. Williams*, 798 F.2d 1024, 1028-30 (7th Cir. 1986).

Does it make a difference if, as here, the wife is not a wife but a girl friend and she lives in her own apartment, not her boyfriend's apartment or an apartment owned or leased jointly by them? It does. If the boyfriend is using her apartment in his drug dealings, then by providing the apartment for his use (whether or not she understands the nature of the use) she is helping his illegal activity, and the third element is satisfied; whereas a wife who merely does not prevent her husband from using their home for illegal purposes does not help his illegal activity in the relevant sense. But the girl friend's knowledge or lack thereof – the first element required for aiding and abetting – remains crucial. If she does not know what use her boyfriend is making of her apartment – if Zafiro did not know what was in the suitcase and did not know that Soto and Garcia were bringing a load of drugs to the apartment when the arrests took place – she is guilty neither of aiding and abetting nor of conspiracy.

To be proved guilty of aiding and abetting, still another element must be established: that the defendant desired the illegal activity to succeed. The purpose of this requirement is a little mysterious but we think it is to identify, and confine punishment to, those forms of assistance the prevention of which makes it more difficult to carry on the illegal activity assisted. A clerk in a clothing store who sells a dress to a prostitute knowing that she

will be using it in plying her trade is not guilty of aiding and abetting. *United States v. Giovannetti*, 919 F.2d 1223, 1227 (7th Cir. 1990); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 747 (3d ed. 1982). The sale makes no difference to her illegal activity. If the clerk didn't make the sale, she would buy, at some trivial added expense in time or money, an equivalent outfit from someone ignorant of her trade. That is where the requirement of proving the defendant's desire to make the illegal activity succeed cuts off liability. The boost to prostitution brought about by selling a prostitute a dress is too trivial to support an inference that the clerk actually *wants* to help the prostitute succeed in her illegal activity. If on the other hand he knowingly provides essential assistance, we can infer that he does want her to succeed, for that is the natural consequence of his deliberate act. It might be better in evaluating charges of aiding and abetting to jettison talk of desire and focus on the real concern, which is the relative dangerousness of different types of assistance, but that is an issue for another day.

In the case of conspiracy the additional element required for guilt is not desire for success, which can be assumed from proof that the defendant joined the conspiracy, but, precisely, the agreement. That element is not supplied by mere knowledge of an illegal activity either, let alone by mere association with other conspirators or mere presence at the scene of the conspiratorial deeds. *United States v. Williams, supra; United States v. Atterson, supra.*

So if all the government had in the way of evidence against Zafiro is that she and the drugs were both found in the apartment at the time of the arrest of her boyfriend

and his two associates, a reasonable jury could not convict her of either conspiracy or aiding and abetting any more than it could have convicted the girl friend whose car was found to contain illegal drugs and who was not even charged (granted, she apparently had never used the car). Guilt by association is not a permissible theory of criminal liability even in the war against drugs. But there is more in this case. A qualified expert witness – an experienced drug enforcement officer – testified that drug dealers do not discuss or deliver large quantities of illegal drugs in the presence of innocent bystanders. When arrested, Zafiro was in the living room of her apartment with Martinez awaiting the delivery by Soto and Garcia of 55 pounds of cocaine, no doubt to be stashed in the apartment until sold. And in Zafiro's closet was a suitcase full of cocaine. It is unlikely that a girl friend would be allowed to think that a suitcase with many thousands of dollars worth of cocaine actually contained a load of flea powder or that a heavy box of cocaine really was full of kitty litter. The witness's testimony about the methods of drug dealers may have been untrue, but Zafiro's counsel presented no testimony to the contrary. And if Zafiro knew that her apartment was being used as a stash house, she was knowingly rendering material assistance to her codefendants and desired that their malefaction succeed.

Zafiro took the stand to defend herself. She denied knowing anything about Martinez's drug dealings. Obviously the jury disbelieved her denials. The government cannot force a defendant to take the stand, of course, but if he does and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence. *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir.

1952) (L. Hand, J.). Concern has been expressed recently that "if negative inferences, based on demeanor evidence, were adequate in themselves to satisfy a rational juror of guilt beyond a reasonable doubt, appellate courts might not be able to provide meaningful review of the sufficiency of evidence." *United States v. Jenkins*, 928 F.2d 1175, 1179 (D.C. Cir. 1991). Judge Hand had expressed the same concern in *Dyer v. MacDougall, supra*, 201 F.2d at 169. Such cases are unlikely to occur, however, for if there is no evidence of guilt other than what the defendant might supply by offering protestations of innocence that the jury disbelieved, he would have no reason to take the stand; he would be entitled to a directed acquittal at the close of the government's case. Zafiro's lawyer did move for directed acquittal then, but he does not cite the denial of that motion as error. We therefore need not decide whether, if Zafiro had not taken the stand, the testimony of the expert witness would have been enough to tip the scales of justice to guilt, given the heavy burden of proof that the government bears in criminal cases. That issue is moot. She testified, and on the basis of her demeanor and the expert testimony the jury was entitled to conclude that she knew what was in the suitcase and what was coming in the box. If she knew those things she knew that by providing her apartment for the storage of these containers she was aiding a drug conspiracy involving Martinez. No more was necessary to make her an aider and abettor of that conspiracy. Cf. *United States v. Percival*, 756 F.2d 600, 610-11 (7th Cir. 1985).

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 91-6824

Gloria Zafiro, Jose Martinez, Salvador Garcia and Alfonso Soto,

Petitioners

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

No. 91-6824

In The

Supreme Court of the United States

October Term, 1991

GLORIA ZAFIRO, JOSE MARTINEZ,
SALVADOR GARCIA, ALFONSO SOTO,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether criminal defendants are entitled to separate trials when their defenses are mutually antagonistic.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 945 F.2d 881 (7th Cir. 1991). This opinion is reproduced in the Joint Appendix at 110-122. The United States District Court for the Northern District of Illinois did not issue a written opinion in this case. The judgments appealed from are reproduced in the Joint Appendix at 63, 74, 96, and 104.

JURISDICTION OF THIS COURT

The Seventh Circuit Court of Appeals issued its opinion in this matter on September 26, 1991. No petition for a rehearing was filed in this matter. The petition for a writ of certiorari was filed timely within 90 days thereafter and this Court granted Certiorari on March 23, 1992. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

This case concerns the constitutionally secured right to due process of law under Amend. V, and the constitutionally secured right to equal protection of the law under Amend. XIV.

Amend. V (1791)

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in

the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. XIV (1868)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Rule 14 of the Federal Rules of Criminal Procedure authorizes a trial court to sever defendants for separate trials: "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires." Fed. R. Crim. P. 14.

STATEMENT OF THE CASE

This is a criminal case. The defendants, Salvador Garcia, Jose Martinez, Alfonso Soto, and Gloria Zafiro, were charged with conspiring to possess cocaine, heroin, and marijuana with intent to deliver in violation of 21 U.S.C. 841(a) and 846 and with possession of heroin, cocaine, and marijuana with intent to distribute in violation of 21 U.S.C. 841(a).

Prior to trial, Defendants Alfonso Soto, Salvador Garcia and Jose Martinez moved for a severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure. Judge Bua, however, denied the motions. Counsel for Salvador Garcia made motions for mistrial and renewed motions for a mistrial based on trial testimony. The Defendants were then jointly tried before a jury in the United States Court for the Nortnern District of Illinois, Eastern Division.

Defendants Garcia, Martinez and Soto were found guilty as charged. Defendant Zafiro was found guilty of conspiring to possess cocaine, heroin and marijuana with intent to distribute, but not guilty of the substantive counts.

Gloria Zafiro, Alfonso Soto and Salvador Garcia were sentenced to one hundred fifty one (151) months imprisonment, to be followed by a five (5) year term of supervised release.

Jose Martinez was sentenced to two hundred sixty two (262) months imprisonment, to be followed by a five (5) year term of supervised release.

Defendants timely filed their Notices of Appeal with the Seventh Circuit Court of Appeals on November 17, 1989, November 30, 1989, December 15, 1989, and December 6, 1989, respectively. The Seventh Circuit Court of Appeals affirmed the Defendants convictions by an opinion issued on September 26, 1991.

Petitions for writ of certiorari were timely filed within 90 days by both the Defendants and the Government.

This court granted Certiorari on March 23, 1992.

SUMMARY OF ARGUMENT

Salvador Garcia, Alfonso Soto and Jose Martinez were friends. Gloria Zafiro was Mr. Martinez's girlfriend. The evidence at petitioners' joint trial established that petitioners distributed illegal narcotics from Zafiro's apartment in Cicero, Illinois, and Mr. Soto's bungalow in Chicago, Illinois. On February 22, 1989, government agents followed Alfonso Soto and Salvador Garcia as they transported a large, heavy box in Mr. Soto's Buick from his garage to Gloria Zafiro's apartment. A government agent followed Mr. Soto and Mr. Garcia up the stairs of Ms. Zafiro's building. Agents entered Ms. Zafiro's apartment and found all four petitioners in the living room.

The box that Mr. Soto and Mr. Garcia were carrying contained 55 pounds of cocaine. In Ms. Zafiro's bedroom closet, agents found a suitcase containing approximately 25 grams of heroin, 16 pounds of cocaine and four pounds of marijuana. During a search of a Ford Probe in

Mr. Soto's garage, agents found approximately eight additional pounds of cocaine. The Ford Probe was registered to Maria Vera, also a girlfriend of Martinez.

Pursuant to Fed. R. Crim. P. 14, Mr. Garcia and Mr. Soto moved for severance of their trials on the ground that their defenses were mutually antagonistic. The district court denied their motions. At trial, Mr. Soto testified that he knew nothing about the drug conspiracy. Rather, he claimed that Mr. Garcia had come to stay with him and had used the Buick and the Ford Probe. Mr. Soto further testified that he had given Mr. Garcia an empty box at the latter's request and that he did not know that Mr. Garcia had placed the box in the trunk of the Buick until they arrived at Ms. Zafiro's apartment. Mr. Soto testified that he did not know what was inside the box until it was opened after their arrest. Although Mr. Garcia did not testify, his theory of defense, as presented by his lawyer during closing argument, was exactly opposite. He argued that the box belonged to Mr. Soto and that Mr. Garcia knew nothing about it.

Mr. Martinez unsuccessfully moved for a severance on the ground that Ms. Zafiro's defense was antagonistic to his own. Ms. Zafiro testified that Martinez stayed in her apartment from time to time but did not live there. She also testified that she did not know what was in the suitcase that was found in her bedroom closet. She stated that Martinez had brought the suitcase to her apartment two days before petitioners were arrested and that he did not tell her what was in the suitcase. Mr. Martinez' lawyer argued that Mr. Martinez did not know that any cocaine was going to be delivered to Zafiro's apartment or that the suitcase in Zafiro's closet contained drugs.

The defendants were all found guilty and appealed.

In affirming, the court of appeals held that the district court did not err by denying a severance to each of the defendants. The court noted that many cases have stated that a defendant is entitled to a severance when the defendants present "mutually antagonistic defenses" such that the acceptance of one party's defense would lead the jury to conclude that the other party is guilty. J.A. 110-118. The court incorrectly refused to adopt that standard. It explained that "[t]he fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid the 'scandal and inequity of inconsistent verdicts' " (quoting *Richardson v. Marsh*, 481 U.S. 200, 210 (1987)). The court stated: "The analogy of interpleader comes to mind, Fed. R. Civ. P. 22; also such joint tort cases." J.A. 114.

The difficulty in this reasoning is that this Seventh Circuit opinion fails to recognize the fundamental difference between a civil and a criminal case. The court concluded that "persons charged in connection with the same crime should be tried separately only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants."

The court offered examples of such a case. First, in "a *complex* case with *many* defendants some of whom might be only *peripherally* involved in the wrongdoing," severance would be required because "the bit players may not be able to differentiate themselves in the jurors' minds

from the stars." J.A. 114. Second, severance may be warranted "where exculpatory evidence essential to a defendant's case will be unavailable – or highly prejudicial evidence unavoidable – if he is tried with another defendant." J.A. 116. Third, where all but one of the defendants try to place blame on that one "so that he finds himself facing a barrage of prosecutors – the official prosecutor and the other defendant's lawyers." J.A. 117. The issue of severance, the court reasoned, should rarely be determined by reference to the existence of mutually antagonistic defenses; rather, "[i]f it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted – and in either case there would be a miscarriage of justice."

The court of appeals found no basis for concluding that a joint trial would prevent a reliable jury verdict in this case:

> Each member of each pair of defendants (Soto-Garcia and Martinez-Zafiro) was accusing the other of being a drug dealer. In this symmetrical situation, each defendant had to defend himself against the prosecutor and one other defendant but at the same time had a live body to offer the jury in lieu of himself (or herself). Soto could say, "Don't convict me, convict Garcia," and Garcia's lawyer could say, "Don't convict my client, convict Soto." This was apt to be a more persuasive line than telling the jury to let everyone go, when the one thing no one could question was that the government had found 75 pounds of cocaine on premises connected with these defendants. No defendant was placed at a *net* disadvantage by being paired with another

> defendant whom he could accuse and who could accuse him in turn, let alone so disadvantaged as to be unable to obtain a fair trial.

A joint trial, the court explained, offered the jury "the full picture," making it both less costly and less prone to error than separate trials would have been.

This decision is directly contrary to the long standing legal rule that mutually antagonistic defenses are grounds for a severance under Rule 14.

This opinion completely eviscerates the law of severance. While the court has placed great emphasis on preserving judicial economy, it has failed to ensure that the basic purpose of a criminal trial is served, to grant the defendant a fair trial based on the evidence against him, and him alone.

Petitioners urge the Court to reverse the judgment and to remand the cause for new, separate trials.

ARGUMENT

WHEN DEFENDANTS IN A CRIMINAL CASE PRESENT ANTAGONISTIC DEFENSES, EACH IS ENTITLED TO A SEVERANCE PURSUANT TO RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 14 of the Federal Rules of Criminal Procedure authorizes a trial court to sever defendants for separate trials:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may

> order an election or separate trial of counts, *grant a severance of defendants* or provide whatever other relief justice requires." Fed. R. Crim. P. 14. (emphasis added)

While the general rule is that persons jointly indicted should be jointly tried,[1] thus promoting judicial efficiency, where there is a risk of prejudice to one party, severance should be granted. *United States v. Lane*, 474 U.S. 473, 484 n.12, 106 S.Ct. 725, 88 L.Ed.2d 814, 826 n.12(7b) (1986); *United States v. Snively*, 715 F.2d 260 (7th Cir. 1983) cert denied 465 U.S. 1007, 104 S.Ct. 101, 79 L.Ed. 2d 233 (1984). See, *e.g.*, *United States v. Warner*, No. 90-3753 (6th Cir. Jan. 31, 1992), slip op. 10-11; *United States v. Tootick*, No. 90-30140 (9th Cir. Dec. 17, 1991), slip op. 16289; *United States v. Romanello*, 726 F.2d 173, 175 (5th Cir. 1984).

Alfonso Soto, Jose Martinez and Salvador Garcia respectfully assert that the trial judge erred in denying their Rule 14 severance motions. In so asserting, Petitioners Soto, Martinez and Garcia are aware that denial of their severance motions will be reviewed under an abuse of discretion standard requiring the defendants to establish that they could not have received a fair trial unless severance was granted. *United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990). *United States v. Tanner*, 471 F.2d 128 (7th Cir. 1972).

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[1] Rule 8(b), Fed. R. Crim. P., provides that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

Alfonso Soto testified that on February 22, 1989, Salvador Garcia awakened him and asked for a ride to Cicero. (Trial Tr. 609). Mr. Garcia wanted Mr. Soto to drive. (Trial Tr. 609). Mr. Soto also testified that Mr. Garcia asked for an empty box. (Trial Tr. 664). Mr. Soto further testified that he was not in Ms. Zafiro's apartment at 11:00 on that morning. (Trial Tr. 660). He also testified he was not driving his Buick at that time either. (Trial Tr. 660). Mr. Soto testified that he did not know there was cocaine in the box, and that Mr. Garcia had borrowed the Ford Probe. (Trial Tr. 611-612). Alfonso Soto's defense was that he had no knowledge of the cocaine and that it was defendant Garcia who was responsible for everything.

Although Garcia did not testify, his defense as presented in his closing argument, was the complete opposite of Alfonso Soto's testimony. (Trial Tr. 839). Garcia denied being at Gloria Zafiro's apartment on the morning of February 22, 1989. Mr. Garcia's defense was that he did not know there was cocaine in the box, and that Mr. Soto had asked Mr. Garcia to go to Cicero. (Trial Tr. 839). Acceptance of defendant Soto's defense precluded acceptance of Garcia's defense.

Mr. Soto's defense was supported by Ms. Zafiro, who testified that Soto never was at the apartment that morning. (Trial Tr. 527). Instead, Gloria Zafiro testified that it was Salvador Garcia who came to the apartment on that morning. (Trial Tr. 527). Had the trial been severed, Mr. Soto's guilt or innocence would have been determined based on Soto's and Zafiro's testimony and the other evidence, independent of the prejudicial and biased defense presented by Garcia. Instead, the jury was presented with a diametrically opposed defense by Garcia

which implicated Mr. Soto. These defenses are mutually exclusive, that is, both cannot be true. Either Soto was not at the apartment and Garcia lied, or Soto was at the apartment and Soto lied. The jury could not have accepted both defenses. Therefore, Alfonso Soto could not have had a fair trial, because the jury, instead of determining just the credibility of Soto, had to determine Garcia's credibility in conjunction with Soto. The jury had two completely opposite factual scenarios that it had to consider.

Because the defenses of Mr. Soto and Mr. Garcia were antagonistic, and because the trial judge refused to sever their trials, it is respectfully asserted that Alfonso Soto did not receive a fair trial.

In the case of Jose Martinez, the government's job was simple; get by a Motion for Judgment of Acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure at the close of its case in chief and let Gloria Zafiro do the rest. They did, and Ms. Zafiro did not let them down.

How did the government know this? While the testimony elicited at the hearing on the motions to Quash Arrests and Suppress Evidence told a great deal, the cross-examination of their second witness, Maria Vera, set the scene.

Ms. Zafiro's attorney's response to Jose Martinez' attorney's objection to the cross-examination of Vera describes the antagonism better than anything that could be said here:

> I believe the evidence will show that this lady had three kilos of cocaine in her car which was

registered to her. That at the time of the incident, as a result and I believe there was no arrest of her; she was not prosecuted for whatever reason, I think that is a proper approach to take, and it is merely by an accident in geography that my client whose residence was used as a storage by the co-defendant, and, therefore, inculpated my client by his presence in her home, I think the jury could reasonably infer from that behavior, the keeping of her, the maintaining of the residence, buying her cars, supplying her food, which I believe the evidence will show is exactly the same scenario as my client had, yet, this lady, for whatever reason, is not prosecuted nor arrested. And I think the analogy is exactly the same. My point is my client should not be here, because the only reason she is here is that Jose Martinez stored his cocaine and other items at her residence, unbeknownst to her and without her active participation. (Trial Tr. 80).

It is noteworthy that Ms. Zafiro's attorney's closing argument continually analogized Gloria Zafiro to Maria Vera, in that each were used by Jose Martinez so he could store narcotics on their property. (Trial Tr. 783-785, 789).

Gloria Zafiro testified that the burgundy suitcase which contained the cocaine, marijuana and heroin which formed the basis for counts 2, 3 and 4 of the indictment was brought into her apartment by Jose Martinez two days prior to their arrest. Further, she testified that she had no idea what was in the suitcase and never handled it. (Trial Tr. 57, 75, 86, 346-347, 518-519, 542-543, 567, 579, 322-323, 326-328).

In fact, Gloria Zafiro testified that she had seen the suitcase inside the bedroom closet. (Trial Tr. 542-543). The suitcase, however, was found outside the closet. (Trial Tr. 347, 356).

Ms. Zafiro also testified that the bag which contained approximately $22,000.00 in United States currency was brought into her apartment the morning of their arrest by Jose Martinez. (Trial Tr. 57, 86, 273, 348, 358, 363, 520-521, 545, 571, 574, 576, 880).

Ms. Zafiro testified that Jose Martinez asked her to safeguard the bag, which she believed contained tavern proceeds. Although she testified she placed the bag on top of a knapsack in her closet, the currency was found inside the knapsack in the bedroom where Martinez had been sleeping. (Trial Tr. 57, 86, 273, 348, 358, 363, 520-524, 542-549, 571-576).

What Gloria Zafiro told the jury was that she was being used by Jose Martinez, who without her knowledge brought and was bringing narcotics and currency into her apartment, and, while purportedly sleeping, handled the narcotics and currency.

Gloria Zafiro did not stop there, however. She testified that on two occasions on February 22, 1989, strangers came to her apartment to see Jose Martinez. Each time she testified she had no conversation with them other than to say Jose was asleep. (Trial Tr. 535-539, 549-550, 556-559, 572).

According to Gloria Zafiro, when Mr. Soto and Mr. Garcia arrived sometime later that day, they were carrying a box which contained cocaine. To no one's surprise,

they again asked for Jose Martinez. Ms. Zafiro testified she went into the bedroom to make the bed and had no idea what was going on. (Trial Tr. 529-530, 550-551, 571-573, 580-584).

Jose Martinez denied the charges against him. Specifically, he denied any knowledge of the heroin, cocaine, marijuana and currency in Ms. Zafiro's bedroom and denied any knowledge of the cocaine which was in the box carried by Soto and Garcia. His theory of defense was that he was in the wrong place at the wrong time, and that his mere presence provided Zafiro the opportunity to protect herself by casting the blame on him. (Trial Tr. 796-797, 801, 304, 806).

It is respectfully asserted that acceptance of Ms. Zafiro's defense, that without her knowledge Jose Martinez brought and arranged to bring narcotics into her house, precluded acceptance of Mr. Martinez' defense; that without his knowledge, Ms. Zafiro had narcotics in and was having narcotics delivered to her house.

Had the trial judge severed Zafiro and Martinez' trials, the jury never would have heard Zafiro's prejudicial and biased testimony.

Either Ms. Zafiro had no knowledge of the narcotics and Mr. Martinez did or Mr. Martinez had no knowledge of the narcotics and Ms. Zafiro did. Both positions cannot be true and therefore acceptance of one defense precluded acceptance of the others.

Because the defenses of Zafiro and Martinez were antagonistic and because the trial judge refused to sever

their trials, it is respectfully asserted that neither Ms. Zafiro nor Mr. Martinez received a fair trial.

Maurice Dailey testified that on February 22, 1989, a surveillance was conducted by Dailey and several other officers under his supervision, at 1925 South 51st Court in Cicero, Illinois (Trial Tr. 42). Dailey stated that a maroon Buick, driven by Alfonso Soto (Trial Tr. 45), pulled from the front of the residence and was followed by several persons on the surveillance team (Trial Tr. 44) to 3517 West 38th Street (Trial Tr. 46). Dailey stated that Appellant Garcia joined Soto (Trial Tr. 48). Thomas Bridges, witness for the government, testified that he saw Mr. Soto and Appellant Garcia leave the premises of 3517 West 38th Street carrying a brown cardboard box (Trial Tr. 269). Dailey also related that the two gentlemen returned to the original residence at 1925 South 51st Court in Cicero (Trial Tr. 48).

Dailey stated that he was witness to Mr. Soto and Appellant Garcia carrying this large cardboard box up the stairs (Trial Tr. 49). It was at this time that Dailey announced he was a police officer (Trial Tr. 49), and chased Soto and Garcia into an apartment where Jose Martinez and Gloria Zafiro were residing (Trial Tr. 50). Dailey discovered that the box Soto and Garcia were carrying contained twenty seven packages of cocaine (Trial Tr. 52, 58). Dailey arrested the four defendants (Trial Tr. 53), and directed two officers to return to 3517 West 38th Street and wait until they received à search warrant for that location (Trial Tr. 53).

When the officers arrived at that residence, which belonged to Mr. Soto (Trial Tr. 304), a woman answered

the door and consented to a search and the officers found a scale known to be used for packaging drugs (Trial Tr. 54). Dailey continued his testimony by revealing that after going into the garage and opening the trunk of a black Ford Probe which was registered to a Maria Vera (Trial Tr. 163), he found a duffel bag with taped packages within it that was later determined to have contained cocaine (Trial Tr. 55). The keys for the Ford Probe were found on the person of Alfonso Soto (Trial Tr. 56). Dailey further related that a search warrant was issued for the residence on 1925 South 51st Court (Trial Tr. 56), and a suitcase was discovered which contained marijuana, heroine and cocaine (Trial Tr. 58).

Dailey testified to have found a driver's license and voter's registration card of Appellant Garcia with the address of 3517 West 38th Street on them (Trial Tr. 66), yet further testified that the drivers license was issued July 31, 1985 and expired April 4, 1989 (Trial Tr. 147) and the voters registration card was from 1987 (Trial Tr. 148). Dailey verified that Appellant Garcia did, at one time, own the house on 38th Street, but Appellant Garcia sold it (Trial Tr. 146).

Appellant Garcia asserts that the defense that he posed below, that he was never actually in possession of the cocaine (Trial Tr. 839), and that possession of the cocaine was by co-defendant Soto, was legally, factually, and logically rebutted by the actual defense and trial testimony of Soto who testified that Appellant Garcia was the mastermind and knowing possessor of the cocaine (Trial Tr. 663-664). Appellant Garcia argues that the defense and the actual conduct at trial by Soto and his

trial counsel deprived him of a fair trial and compelled a severance in the interests of justice.

In this case, presenting Appellant Garcia's defense under the circumstances of facing both the government prosecutor and a second prosecutor (Soto), the likelihood of confusion and the resulting denial of a fair trial was inexcusable. See, *United States v. Ziperstein*, 601 F.2d 281, 285 (7th Cir. 1979) and *United States v. Romanello*, 726 F.2d 173, 174, 182 (5th Cir. 1984).

Because the defenses of Mr. Soto and Mr. Garcia were antagonistic and because the trial judge refused to sever their trials, it is respectfully asserted that Salvador Garcia did not receive a fair trial.

This case is factually and legally close to the situation discussed in *United States v. Ziperstein*, 601 F.2d 281 (7th Cir. 1979):

> An example of "mutually antagonistic" defenses is presented in *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). In *DeLuna*, one defendant claimed that he came into possession of narcotics only when the other defendant saw the police approach and shoved the drugs into his hands. The other defendant, however, denied having ever possessed the drugs and claimed that they had always been in the possession of the first defendant. In a case such as *DeLuna*, where someone must have possessed the contraband, and one defendant can only deny his own possession by attributing possession and consequent guilt to the other, the defenses are antagonistic. *Ziperstein*, 601 F.2d at 285 (7th Cir. 1979).

In *accord, Smith v. Kelso,* 863 F.2d 1564, 1569-1571 (11th Cir. 1989).

Likewise, in *United States v. Romanello,* 726 F.2d 173 (5th Cir. 1984), the Fifth Circuit, in the colorful language of Judge Goldberg, made the following salient comments on the antagonism of defenses and defendant and the effects of such a situation upon a fair trial:

> Conspiracy trials, with their world-girdling potential, are given more extensive thrust by the admission of hearsay testimony, the use of conspiratorial acts to prove substantive offenses, and the joint trial of defendants. These pressures alone threaten to undermine the fair consideration of individual conspiracy defendants. However, the dangers inherent in joint trials become intolerable when the co-defendants become gladiators, ripping each other's defenses apart. In their antagonism, each lawyer becomes the government's champion against the co-defendant, and the resulting struggle leaves both defendants vulnerable to the insinuation that a conspiracy explains the conflict. *Romanello,* 726 F.2d at 182.

And also:

> I saw a lizard come darting forward on six great taloned feet and fasten itself to a [fellow soul] . . . [T]hey fused like hot wax, and their colors ran together until neither wretch nor monster appeared what he had been when he began . . . [citing Dante, *The Inferno,* Canto XXV, Circle 8, Bolgia 7, lines 46-48, 58-60 (J. Ciardi, transl)]. Quoted at 726 F.2d at 182.

The joint trial of conspiracy defendants was originally deemed useful to prove that the parties planned their crimes together. However, it has become a powerful tool for the government to prove substantive crimes and to cast guilt upon a host of co-defendants. In this case, we are concerned with the specific prejudice that results when defendants become weapons against each other, clawing into each other with antagonistic defenses. Like the wretches in Dante's hell, they may become entangled and ultimately fuse together in the eyes of the jury, so that neither defense is believed and all defendants are convicted. Under such circumstances, the trial judge abuses its discretion in failing to sever the trials of the co-defendants. *Romanello,* 726 F.2d at 174.

THIS SEVENTH CIRCUIT DECISION IS IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEALS AND ITS PRIOR DECISIONS.

Unlike the court in this case, other courts of appeals have held that severance is required when defendants present squarely antagonistic defenses. Thus, the Fifth Circuit has held that a defendant may "compel severance" when the defenses at trial are "antagonistic to the point of being irreconcilable and mutually exclusive." *Romanello,* 726 F.2d at 177; see also *United States v. Crawford,* 581 F.2d 489, 492 (5th Cir. 1978). The Tenth Circuit has likewise required a severance when the defendants' defenses are "mutually exclusive," so that the acceptance of the defense of one defendant would "tend to preclude the acquittal of [the other]." *United States v. Peveto,* 881 F.2d 884, 858 (10th Cir. 1989); *United States v. Smith,* 788

F.2d 663, 668 (10th Cir. 1986). The Eleventh Circuit has followed a similar rule. In *United States v. Rucker*, 915 F.2d 1511 (11th Cir. 1990), the court held that a new trial is required if two defendants' stories are mutually exclusive and irreconcilable so that the "juxtaposition of the co-defendants' protestations of innocence would make each defendant 'the government's best witness against the other.' " *Id.* at 1513 (quoting *Crawford*, 581 F.2d at 492).

Under the principles applied in these decisions, petitioners would have been entitled to severance because of their mutually exclusive and irreconcilable defenses. Soto and Garcia were caught transporting a large cardboard box containing 55 pounds of cocaine. Each defendant claimed that he had no knowledge of the contents of the box because it belonged to the other defendant. No reasonable juror could have believed that neither of the defendants had dominion and control over the large box of cocaine that both of them were driving across town; hence, the core of each defendant's defense implicated the other in the crime. The same is so with respect to Martinez and Zafiro. If Martinez had stored the suitcase with Zafiro, and Zafiro did not know that it contained 20 pounds of cocaine, that would have tended to preclude Martinez from being acquitted on the theory presented by his lawyer – that Martinez was unaware of the contents of a suitcase found in someone else's apartment. If, on the other hand, the jury believed Martinez's account, Zafiro's defense would have collapsed.

Other courts have adopted varying formulations of the rule requiring a severance when defendants take positions at odds with those of their co-defendants. In some circuits, conflicting defenses will require severance when

the conflict is so prejudicial that the differences are irreconcilable, and the jury will unjustifiably infer that the conflict itself indicates the guilt of both defendants. See, *e.g., United States v. Clark*, 928 F.2d 639, 644 (4th Cir. 1991); *United States v. Davis*, 623 F.2d at 188 (1st Cir. 1980); *United States v. Haldeman*, 559 F.2d 31, 71 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977). The Ninth Circuit recently concluded that the need for severance must be evaluated by reference to whether the jury is able "to assess the guilt or innocence of each defendant on an individual and independent basis." *United States v. Tootick*, No. 90-30140 (9th Cir. Dec. 17, 1991).

The Seventh Circuit has previously recognized the importance of severance in *United States v. Snively*, 715 F.2d 260 (7th Cir. 1983), *cert. denied* 465 U.S. 1007 (1984). When the parties present antagonistic defenses, prejudice exists and severance pursuant to Rule 14 is appropriate. *United States v. Oglesby*, 764 F.2d 1203 (7th Cir. 1985). Severance should therefore be granted where acceptance of one defendant's defense precludes acceptance of the other defendant's defense. *United States v. Buljubasic*, 808 F.2d 1260 (7th Cir. 1987); *United States v. Gironda*, 758 F.2d 1201 (7th Cir. 1985).

The factual scenario herein is entirely different from others considered by the Seventh Circuit. This case is not merely the antagonism caused by the different defenses of not guilty and entrapment, *United States v. Williams*, 858 F.2d 1218 (7th Cir. 1988) *cert. denied*, 109 S.Ct. 796; nor the antagonism caused by the conflict of a non-participation defense and an insufficiency of evidence defense, *United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990); nor

the antagonism caused by the conflict of a lack of knowledge defense and entrapment, *United States v. Rollins*, 862 F.2d 1828 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 2084.

CONCLUSION

The Seventh Circuit's opinion in this case is not only a substantial departure from the existing law of severance, it is contrary to that body of law. Failure to grant the Defendants' request for severance denies them a fair trial. This Court should reverse the decision of the Seventh Circuit and grant the Defendants new, separate trials.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1992

GLORIA ZAFIRO, JOSE MARTINEZ, SALVADOR GARCIA AND ALFONSO SOTO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether criminal defendants are entitled to separate trials because they present antagonistic defenses.

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No. 91-6824

GLORIA ZAFIRO, JOSE MARTINEZ, SALVADOR GARCIA AND ALFONSO SOTO, PETITIONERS

v.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals, J.A. 110-123, is reported at 945 F.2d 881.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1991. The petition for a writ of certiorari was filed on December 23, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Rule 8, Fed. R. Crim. P., provides in relevant part:

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment

or information if they are alleged to have participated in the same act or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14, Fed. R. Crim. P., provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of various narcotics offenses. All four petitioners were convicted of conspiring to possess cocaine, heroin, and marijuana with the intent to distribute those substances, in violation of 21 U.S.C. 846. In addition, petitioners Garcia and Soto were each convicted of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and petitioner Martinez was convicted of possessing cocaine, marijuana, and heroin with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1). Garcia, Soto, and Zafiro were each sentenced to 151 months in prison, to be followed by five years of supervised release.[1] Martinez was sentenced to 262

[1] The jury acquitted Zafiro of possession with intent to distribute controlled substances. J.A. 110.

months in prison, to be followed by five years of supervised release. J.A. 63-66, 74-77, 96-99, 104-107. The court of appeals affirmed. J.A. 110-123.

1. On February 22, 1989, based on a tip from a confidential informant, Chicago police officers who were members of a Drug Enforcement Administration task force conducted surveillance of the apartment building in Cicero, Illinois, where petitioner Gloria Zafiro lived. Tr. 39-42, 392. That day, the officers saw petitioner Alfonso Soto drive up to the front of the building, look over the area, and enter the building. Tr. 340-342. Soto left several minutes later, and officers followed him along a circuitous route to his house in Chicago. Tr. 44-46, 266-267.

Petitioner Salvador Garcia joined Soto in the alley behind Soto's house. Tr. 46, 267-268. After going into the garage, Soto and Garcia placed a large, heavy box in the trunk of Soto's car. Tr. 267-269. Soto and Garcia then returned by side streets to Zafiro's apartment and carried the cardboard box up the stairs of her building. J.A. 111; Tr. 126-128, 343-344, 377-378. A police officer followed the two, identified himself, and ordered them to stop. J.A. 111; Tr. 49, 128-133. Soto and Garcia then dropped the box and ran into Zafiro's apartment. J.A. 111-112; Tr. 50, 137-138, 157. The police quickly followed, finding all four of the petitioners in the living room. J.A. 112; Tr. 50-51, 345.

The box that Soto and Garcia were carrying contained 27 tightly wrapped packages that appeared to be kilogram packets of cocaine. Tr. 52, 58, 313-314, 456-457. A field test of the contents of one of the packets confirmed that it contained cocaine. Tr. 52. Petitioners were arrested. After obtaining a warrant to search Zafiro's apartment, police officers found in

the bedroom a suitcase containing approximately 25 grams of heroin, 16 pounds of cocaine, and four pounds of marijuana. J.A. 112; Tr. 56-58, 74-75, 321-328, 346-347. Next to the suitcase, the police found a knapsack containing $22,960 in cash. Tr. 57, 272-273.

At the same time, several police officers returned to Soto's house in Chicago. Tr. 53, 270. A woman who identified herself as Mrs. Soto consented to a search of the entire residence. Tr. 53-54, 103-105, 270, 290-291. In the basement, the officers found an Ohaus triple beam gram scale, an item commonly used to weigh drugs. Tr. 54, 106-108. They also found a Ford Probe in the garage, which the officers opened with a key taken from Soto after his arrest. Tr. 55-56. In the trunk of the car the police found approximately seven to eight pounds of cocaine in taped packages that were similar to the packages found in the box seized in Cicero. J.A. 112; Tr. 55-56, 110-112, 160, 271-272. The Ford was registered to Maria Vera, a girlfriend of petitioner Jose Martinez. The evidence at trial showed that Martinez purchased the car, that Vera never used it, and that she last saw it when Martinez lent it to someone in January 1989. Tr. 172-178, 203-204.

2. Pursuant to Fed. R. Crim. P. 14, Garcia and Soto moved to sever their trials on the ground that their defenses "conflict to the point of being irreconcilable and mutually exclusive and inconsistent because each defendant accuses the other of having performed acts which demonstrate culpability." J.A. 82, 102. Soto and Garcia alleged that each would mount a defense based on the theory that he had no knowledge of the contents of the box they transported to Zafiro's apartment and that the other was guilty of

the acts charged by the government. J.A. 81, 101. Martinez moved to sever his trial from Zafiro's on the ground that Zafiro's testimony in her own defense would implicate him. J.A. 70.

The district court denied the motions to sever. J.A. 62, 88-90; Tr. 5. The court reasoned that "[f]inger-pointing is an acceptable cost of the joint trial and at times is even beneficial because it helps complete the picture before the trier of fact." J.A. 89 (quoting *United States* v. *Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.), cert. denied, 484 U.S. 815 (1987)). The court also noted that the jury could accept the defense of Soto or Garcia without necessarily finding that the government had proved its case against the other. J.A. 89.

3. At trial, Soto testified that he had worked with Garcia and had purchased Garcia's home in Chicago when Garcia moved from Chicago in 1987. Tr. 604-606, 658-659. According to Soto, Garcia had returned to stay with him while looking for work, and on the day of their arrests, Garcia asked Soto to drive him to Cicero. Tr. 607-609. Soto denied having any knowledge that he was transporting a box full of cocaine, and he claimed he had never met Zafiro or Martinez before the trip to Cicero. Tr. 611, 663-665. Soto also testified that he had never seen the Ford Probe before, and that Garcia said that someone had lent him the car. Tr. 612, 657, 674-675.

Garcia did not testify at trial, but in closing argument his attorney asserted, contrary to Soto's testimony, that the cardboard box containing the cocaine belonged to Soto, and that Garcia did not know what it contained. J.A. 112; Tr. 838-842.

Zafiro, who was Martinez's girlfriend, testified that Martinez brought the suitcase to her apartment two days before petitioners were arrested but that

she did not know what was in the suitcase. J.A. 112; Tr. 519, 542-543. Zafiro further testified that Martinez came to her apartment on the day of the arrests, asked her to store some cash (which she placed on top of the knapsack found by the police), and went to sleep. Tr. 520-522, 545-547. According to Zafiro, Garcia came to see Martinez that morning, and Soto and Garcia returned later, at which point the police came to arrest them all. Tr. 526-530, 551-559. Zafiro claimed that she had never seen Soto or Garcia before. Tr. 526-527.

Martinez did not testify, but his lawyer argued that Martinez just happened to be in Zafiro's apartment when Soto and Garcia came there to deliver cocaine. Tr. 801. Counsel also argued that Zafiro was seeking to shift blame from herself to Martinez; he pointed out that it was Zafiro, not Martinez, who lived in the apartment where the police found the suitcase full of drugs. J.A. 112; Tr. 804, 806-807.

4. After the jury returned its verdict, Soto moved for a new trial on the ground that the district court erred by not severing his trial from Garcia's because of their antagonistic defenses. J.A. 83. Martinez moved for a new trial because the court did not sever his trial from Zafiro's. J.A. 92. The district court denied both motions. J.A. 73, 95.[2]

[2] After Soto testified, Garcia moved for a mistrial and a severance on the ground that Soto had testified that he was innocent and that Garcia was guilty. Tr. 614. Martinez also renewed his motion to sever after Zafiro's testimony. Tr. 615-616. The court, however, denied those motions. Tr. 615-616. Petitioners unsuccessfully moved for a severance at the close of the evidence and prior to closing arguments. Tr. 748-749. Petitioners then moved for a mistrial and a severance based on the closing arguments in the case, but their motions were denied. Tr. 831-832, 880-881.

5. The court of appeals affirmed. J.A. 110-122. The court observed that Fed. R. Crim. P. 14 "allows severance if a defendant * * * [is] 'prejudiced' by a joint trial," but noted that the Rule says "nothing about mutual antagonism." J.A. 113. The court rejected the principle that defendants are entitled to severance because they raise "mutually antagonistic defenses" at trial: "The fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid 'the scandal and inequity of inconsistent verdicts.'" J.A. 113-114 (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987)). Observing that a severance is required "only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants," J.A. 114,[3] the court explained:

> [M]utual antagonism, finger-pointing, and other manifestations or characterizations of the effort of one defendant to shift the blame from himself to a codefendant neither control nor illuminate the question of severance. If it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be ac-

[3] The court offered two examples: First, in "a *complex* case with *many* defendants some of whom might be only *peripherally* involved in the wrongdoing," the court noted the risk that "the bit players may not be able to differentiate themselves in the jurors' minds from the stars." J.A. 114. Second, the court suggested that a joint trial could "throw the jury off the scent * * * where exculpatory evidence essential to a defendant's case will be unavailable—or highly prejudicial evidence unavoidable—if he is tried with another defendant." J.A. 116.

quitted or all convicted—and in either case there would be a miscarriage of justice.

J.A. 116.

The court explained that the benefits of a joint trial "went beyond the avoidance of duplication. The jury was given the full picture, which it would not have had if the trial had been limited to two of the four alleged conspirators." J.A. 117. As a result, the court noted, a joint trial in a case such as this one reduces not only the costs of litigation, but also the risk of error. *Ibid.* Accordingly, the court found that the district court had not abused its discretion in conducting a joint trial.

SUMMARY OF ARGUMENT

When defendants are prosecuted for offenses arising out of the same acts or transactions, Rule 8 of the Federal Rules of Criminal Procedure authorizes the government to indict them together. The law strongly favors joint trials of persons who are indicted together, but initial joinder does not require that the parties remain joined for trial. Under Rule 14 of the Federal Rules of Criminal Procedure, a district court may sever defendants or counts if the conduct of the trial appears likely to prejudice one of the parties. The decision whether to sever a trial is committed to the trial court's discretion, and a defendant can disturb a determination not to sever a trial only if he can show that a joint trial has resulted in unfairness.

In general, joint trials promote the fairness of a criminal trial. Joint trials serve the truthseeking function of criminal procedings because the jury has all of those involved in the events before it at once and therefore obtains a fuller picture of the case.

Those advantages are even more important when the defendants present irreconcilable or mutually exclusive defenses, in which case it is highly likely that at least one of the defendants is giving a false account of the pertinent events. When the defendants present their competing accounts to a single jury, their stories are subjected to sharper adversarial testing, and the jury is more likely to discover the truth. The jury is in a better position to evaluate the relative credibility of the stories or defenses of each defendant when they are all before it at one time. And, by placing all the defendants before the same jury, joinder reduces the likelihood of inconsistent verdicts.

In this case, petitioners have not shown that they were prejudiced by being tried together. Although Soto and Garcia (through his attorney) gave contradictory accounts of the relevant events, as did Zafiro and Martinez (through his attorney), none of them has suggested any basis for concluding the adversarial presentation of their conflicting stories made it less, and not more, probable that the jury rendered a reliable verdict. Nor have they shown any other grounds for concluding that joinder of their charges deprived them of a fair trial.

ARGUMENT

I. THE PRESENTATION OF ANTAGONISTIC DEFENSES DOES NOT DEPRIVE JOINTLY TRIED DEFENDANTS OF A FAIR TRIAL

A. A Joint Trial Is Preferred When Defendants Are Accused of Offenses Arising from the Same Acts, Unless It Would Deny Them a Fair Trial and Result in a Miscarriage of Justice

The general principles governing the conduct of joint trials under the Federal Rules of Criminal Procedure are well settled. Rule 8(b), Fed. R. Crim. P., provides that defendants may be indicted together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions." Applying that principle, the courts have held that persons who are indicted together should generally be tried together, particularly when they are charged with conspiracy. See, *e.g.*, *United States* v. *Brooks*, 957 F.2d 1138, 1145 (4th Cir. 1992); *United States* v. *Ellender*, 947 F.2d 748, 754 (5th Cir. 1991); *United States* v. *Cross*, 928 F.2d 1030, 1037 (11th Cir. 1991), cert. denied, 112 S. Ct. 594 (1991) and 112 S. Ct. 941 (1992); *United States* v. *Stephenson*, 924 F.2d 753, 761 (8th Cir.), certs. denied, 112 S. Ct. 63 and 112 S. Ct. 321 (1991).

The rationale supporting the preference for joint trials is straightforward. As this Court has explained, the joinder of defendants for trial promotes judicial economy and fairness:

> It would impair both the efficiency and the fairness of the criminal justice system to require * * * that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand.

Richardson v. *Marsh*, 481 U.S. 200, 210 (1987); accord *United States* v. *Lane*, 474 U.S. 438, 449 (1986) ("In common with other courts, th[is] Court has long recognized that joint trials 'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.'") (quoting *Bruton* v. *United States*, 391 U.S. 123, 134 (1968)). In addition, by avoiding separate trials of guilt arising from joint participation in criminal wrongdoing, joinder "generally serve[s] the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Richardson*, 481 U.S. at 210. Finally, joint trials promote fairness by "enabling more accurate assessment of relative culpability—[an] advantage[] which sometimes operate[s] to the defendant's benefit." *Ibid.*[4]

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[4] "[J]oinder of claims, parties and remedies is strongly encouraged" in the civil context as well. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 724 (1966). For example, the Federal Rules of Civil Procedure provide for broad permissive joinder of defendants in actions arising out of the same transactions or occurrences. Fed. R. Civ. P. 20(a). The Rules of Civil Procedure also provide for compulsory joinder, Fed. R. Civ. P. 19(a), and for class action lawsuits, Fed. R. Civ. P. 23. Rules 19 and 23, moreover, explicitly rely on joinder to address the risk that multiple lawsuits arising from the same controversy will give rise to inconsistent results. Actions for interpleader, Fed. R. Civ. P. 22, are also designed to guard against the possibility of inconsistent results "by requiring the rival claimants to litigate before [a single court] the decisive issue" of entitlement to a single recovery. *Texas* v. *Florida*, 306 U.S. 398, 407 (1939). In civil, as in criminal, cases, joinder serves "the interest

While joint trials are favored, district courts retain authority under Fed. R. Crim. P. 14 to sever trials "[i]f it appears that a defendant or the government is prejudiced by a joinder of * * * [defendants] for trial together." As this Court has consistently recognized, however, the decision whether to grant a severance is a matter for the district court's discretion, not a right of the criminal defendant, and the court's disposition of a motion for a severance is reviewable only for an abuse of that discretion. See *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 486 (1827) (Story, J.) ("where two or more persons are jointly charged in the same indictment, * * * such persons have not a right, by the laws of this country, to be tried severally, separately, and apart, the counsel for the United States objecting thereto; but * * * such separate trial is a matter to be allowed in the discretion of the Court before whom the indictment is tried"); *United States* v. *Ball*, 163 U.S. 662, 672 (1896) ("the question whether defendants jointly indicted should be tried together or separately was a question resting in the sound discretion of the court below"); *Stilson* v. *United States*, 250 U.S. 583, 585-586 (1919) ("That it was within the discretion of the court to order the defendants to be tried together there can be no question, and the practice is too well established to require further consideration."); *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Lane*, 474 U.S. at 449-450 n.12.

It is well settled that a defendant is not entitled to a severance merely because he would have had a

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of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 111 (1968).

better chance of being acquitted in a separate trial. See, *e.g.*, *United States* v. *Warner*, 955 F.2d 441, 447 (6th Cir. 1992); *United States* v. *Martinez*, 922 F.2d 914, 922 (1st Cir. 1991); *United States* v. *Manner*, 887 F.2d 317, 326 (D.C. Cir. 1989), cert. denied, 493 U.S. 1062 (1990). Rather, because Rules 8 and 14 are designed to secure the advantages of joinder "where the[y] * * * can be achieved without substantial prejudice to the right of the defendants to a fair trial," *Bruton* v. *United States*, 391 U.S. 123, 131 n.6 (1968), a defendant may obtain relief from the trial court's refusal to sever a joint trial only if he can show that the joint proceeding denied him a fair trial. See, *e.g.*, *United States* v. *Leiva*, 959 F.2d 637, 641 (7th Cir. 1992); *United States* v. *Cardascia*, 951 F.2d 474, 482 (2d Cir. 1991); *United States* v. *Featherson*, 949 F.2d 770, 773 (5th Cir. 1991), cert. denied, 112 S. Ct. 1771 (1992).

B. A Joint Trial of Offenses Arising From the Same Acts or Transactions Enhances the Accuracy and Consistency of the Verdicts

Despite the strong presumption in favor of joint trials and the high threshold for establishing an entitlement to a severance, petitioners contend that the district court abused its discretion by not severing their joint trial because of the antagonistic defenses that they presented. In support of that claim, petitioners rely, Pet. Br. 19-22, on court of appeals decisions that have treated antagonistic defenses as a ground for severance. That reliance is misplaced. Although many court of appeals decisions have recognized antagonistic defenses as a ground for severance in some circumstances,[5] the reasoning of those cases

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[5] For example, some courts of appeals have stated that severance is required when co-defendants present irrecon-

proceeds from a faulty assumption—that the fairness of a criminal trial is compromised by bringing all the conflicting stories before a jury at one time.

1. *Joint Trials Serve the Truthseeking Function and Avoid the Inequity of Inconsistent Verdicts*

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Estes* v. *Texas*, 381 U.S. 532, 540 (1965). Indeed, "the very nature of a trial [is] a search for truth." *Nix* v. *Whiteside*, 475 U.S. 157, 166 (1986); accord *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1264 (1991) ("the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence") (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986)); *Stone* v. *Powell*, 428 U.S. 465, 490 (1976) ("the ultimate question of guilt or innocence

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cilable or mutually exclusive defenses and the jury will unjustifiably infer that the conflict alone establishes that both defendants are guilty. See, *e.g.*, *United States* v. *Clark*, 928 F.2d 639, 644 (4th Cir. 1991); *United States* v. *Walton*, 552 F.2d 1354, 1361 (10th Cir.), cert. denied, 431 U.S. 959 (1977); *United States* v. *Robinson*, 432 F.2d 1348, 1351 (D.C. Cir. 1970). In other cases, the courts have held that a severance is required if the defenses are inconsistent to the degree that accepting one co-defendant's defense would preclude the jury from accepting the other's defense. See, *e.g.*, *United States* v. *Rucker*, 915 F.2d 1511, 1513 (11th Cir. 1990); *United States* v. *Tutino*, 883 F.2d 1125, 1130 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990); *United States* v. *Berkowitz*, 662 F.2d 1127, 1134 (5th Cir. 1981). Still other cases have indicated that to prevail on a motion for severance, a defendant must show that the antagonistic defenses would mislead or confuse the jury. See, *e.g.*, *United States* v. *Benton*, 852 F.2d 1456, 1469 (6th Cir.), cert. denied, 488 U.S. 993 (1988).

* * * should be the central concern in a criminal proceeding").

The interest in accurate factfinding is ordinarily served by giving the factfinder the entire picture of the case before it. As this Court has explained:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. *Nixon*, 418 U.S. 683, 709 (1974). The Court has emphasized in various contexts the importance of providing the factfinder with all relevant information bearing on the question of guilt or innocence. For example, that principle has played a central role in the Court's application of the Fourth Amendment exclusionary rule. See, *e.g.*, *Nix* v. *Williams*, 467 U.S. 431, 443 (1984) (adopting the "inevitable discovery" rule based upon the "public interest in having juries receive all probative evidence of a crime"); see also *Illinois* v. *Gates*, 462 U.S. 213, 257-258 (1983) (White, J., concurring) ("any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way"). It has also guided the Court's treatment of discovery obligations in criminal proceedings, see, *e.g.*, *Taylor* v. *Illinois*, 484 U.S. 400, 411-412 (1988) (requiring pretrial disclosure of witnesses serves the "broader public interest in a full and truthful disclosure of

critical facts" to the jury); *United States* v. *Nobles*, 422 U.S. 225, 230-232 (1975) (upholding order compelling disclosure of defense investigator's report when disclosure "might substantially enhance 'the search for truth'"); *Williams* v. *Florida*, 399 U.S. 78, 82 (1970) (upholding Florida notice of alibi statute, which was "designed to enhance the search for truth in the criminal trial").

The law of joinder is another area in which the principle of completeness has played an important role. As the courts have recognized, a joint trial directly promotes the ends of criminal justice because "the jury [is] given the full picture," which it would not have if the trial were severed. J.A. 117; see *United States* v. *Sophie*, 900 F.2d 1064, 1083 (7th Cir.) ("trying all participants [in a conspiracy] at once will give a better, and more accurate, picture of the case as a whole"), cert. denied, 111 S. Ct. 124 (1990); *Rakes* v. *United States*, 169 F.2d 739, 744 (4th Cir.) (by "giv[ing] the jury a complete overall view" of alleged criminal conduct, a joint trial "helps [it] to see how each piece fits into the pattern" of alleged wrongdoing), cert. denied, 335 U.S. 826 (1948). To the extent that a severance results in reducing the completeness of the picture of the crime that is presented to the jury, it is likely to impair the ability of the jury to render an accurate verdict.

The "antagonistic defenses" severance doctrine, in particular, is contrary to the principle that the jury system ordinarily functions best when the jury has unrestricted access to relevant information about the crime and those allegedly involved in it. The premise underlying each petitioner's claim in this case is that each should have been permitted to present his or her story to the jury without the risk of rebuttal from the

particular co-defendant to whom he or she was trying to shift blame. Yet that is a formula for inaccurate fact-finding; it is certainly not a premise that should be favored in a system that assumes the truth is most likely to emerge if conflicting factual assertions are subjected to adversarial testing.

As we have noted, the lower courts that recognize antagonistic defenses as a ground for severance have typically insisted that the defenses be irreconcilable or mutually exclusive. The case law, therefore, perversely requires defendants to be tried separately only when one or more of them is necessarily giving a false account of the events with which they all are familiar. But it is in precisely those circumstances that the rationale for joint trials is most compelling. As this Court has emphasized, "[t]ruth * * * is best discovered by powerful statements on both sides of the question," and the adversary process is "the unique strength" of our criminal justice system. *United States* v. *Cronic*, 466 U.S. 648, 655 (1984); see *Maryland* v. *Craig*, 110 S. Ct. 3157, 3163 (1990) ("rigorous adversarial testing * * * is the norm in Anglo-American criminal proceedings"). When different individuals offer different versions of events in which they all participated, the jury's understanding will inevitably be sharpened as each defendant seeks to establish—through testimony, cross-examination, or closing argument—that his story is correct and his co-defendant's is not.

The elimination of the threat of rebuttal by a co-defendant can only increase each defendant's incentive and ability to give a false account of the events with which the co-defendants are both familiar. False testimony, of course, "tends to defeat the sole ultimate objective of a trial" because "it may produce

a judgment not resting on truth." *In re Michael*, 326 U.S. 224, 227 (1945). It is a familiar pattern in severed trials involving multiple alleged offenders that "each defendant will try to create a reasonable doubt by blaming an absent colleague." *United States* v. *Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.), cert. denied, 484 U.S. 815 (1987). Joinder reduces the risk that defendants will adopt that tactic relatively free of risk. As one court has noted, the fact "[t]hat different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than against a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together." *Ware* v. *Commonwealth*, 537 S.W.2d 174, 177 (Ky. 1976).

A joint trial promotes fairness in another way, by reducing the incentive for pretrial maneuvering and reducing the risk that separate juries will reach inconsistent results with respect to severed defendants. In a case such as this one, for example, a single jury in a joint trial would virtually have to conclude that some of the petitioners are guilty; the jury's task would be to decide which, if any, of the petitioners' stories seemed plausible and to convict those whose stories did not. If the defendants were severed for trial, however, each jury could conclude that the particular defendants on trial were telling the truth and that their absent colleagues were the guilty parties, even though the juries' conclusions would be irreconcilable.

Granting severances when defendants announce the intention to present antagonistic defenses creates an incentive for defendants to engage in tactical maneuvering that complicates the pretrial process

and disserves the interests of both judicial economy and fairness. Defendants often seek a severance, not only because they believe they have a better chance of being acquitted if they are tried alone, but also because the defendant who is tried last has the advantage of "knowing the government's case beforehand," *Richardson*, 481 U.S. at 210, and being able to couch his presentation to take advantage of any perceived weak points in the government's case. As a result, it is common to see "codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried." *Bruton* v. *United States*, 391 U.S. at 143 (White, J., dissenting). In that situation, the verdicts may rest not on the jury's assessment of the competing evidence and the relative culpability of each of the defendants, but instead on the order in which the defendants were tried. By contrast, where a single jury chooses at one time among the conflicting stories of all the defendants and the government, "the scandal and inequity of inconsistent verdicts," *Richardson*, 481 U.S. at 210, is eliminated.

2. *A Defendant Is Not Unfairly Prejudiced Because His Co-Defendant Acts as an Accuser*

Petitioners assert, Pet. Br. 17-19, that they were deprived of a fair trial because each was required to face a co-defendant as an additional accuser at trial. That circumstance, however, is not sufficient to constitute prejudice within the meaning of Rule 14, for several reasons.

First, there is nothing unfair or even unusual about a defendant's accomplice testifying against him at trial. The prosecution frequently is able to offer at trial the testimony of an accomplice who might

have been a co-defendant but who instead has received immunity, pleaded guilty, or been convicted in a separate proceeding. The antagonistic defense of a co-defendant at trial is no more prejudicial than the presentation of damaging testimony from one who has already been convicted or who is cooperating with the government. Indeed, a co-defendant's presentation of an antagonistic defense may well be less harmful, because the jury is unavoidably aware that the co-defendant is acting with a very powerful motive to exculpate himself.

Second, any prejudice that might flow from a co-defendant's acting as a "second prosecutor" is offset by the benefit the defendant obtains from the presence at trial of another potentially culpable defendant. As the court of appeals explained in this case:

> [E]ach defendant had to defend himself against the prosecutor and one other defendant but at the same time had a live body to offer the jury in lieu of himself (or herself). Soto could say, "Don't convict me, convict Garcia," and Garcia's lawyer could say, "Don't convict my client, convict Soto." This was apt to be a more persuasive line than telling the jury to let everyone go, when the one thing that no one could question is that the government had found 75 pounds of cocaine on premises connected with these defendants. No defendant was placed at a *net* disadvantage by being paired with another defendant whom he could accuse and who could accuse him in turn, let alone so disadvantaged as to be unable to obtain a fair trial.

J.A. 117.

Third, there is no basis for concluding that the jury is more likely to reach an inaccurate result if

a defendant's attorney cross-examines a co-defendant or seeks to implicate that co-defendant during closing argument. If one defendant's attorney conducts proper and effective cross-examination of a co-defendant, it is likely to enhance the reliability of the verdict. And while a defendant's attorney may implicate a co-defendant or contradict his defense during the closing argument, there is nothing unfairly prejudicial about the jury's hearing such an argument from a co-defendant. Because the jury is unquestionably going to be aware that defense counsel is seeking to exculpate his client, there is every reason to believe that the jury will view counsel's closing presentation with an appropriate degree of skepticism.

We recognize, of course, that there will be instances in which antagonistic defenses are presented and it is appropriate to sever the trials. For example, where a nontestifying defendant has given a confession that facially inculpates a co-defendant, it would be necessary under *Bruton*, 391 U.S. at 136, to try the defendants separately if the damaging material cannot be redacted. Severance might also be warranted if the joint trial encompassed a large number of defendants being tried for a variety of crimes, and the danger of jury confusion were unacceptably high, even with cautionary instructions. Cf. *United States* v. *Lane*, 474 U.S. at 450-451 n.13. Situations such as those, however, can be addressed on a case-by-case basis and do not warrant application of a general rule requiring severance because of the presentation of irreconcilable or mutually exclusive defenses.[6] In

[6] Other risks associated with joint trials can be minimized by appropriate controls exercised by the district court. For example, if an antagonistic co-defendant sought to make an unfairly prejudicial closing argument aimed at another de-

sum, when co-defendants present conflicting accounts of the same events, the adversary presentation of their differing stories presents a fuller picture to the jury, sharpens the presentation of the case, and makes the verdicts more reliable. There is no reason to think that the jury will have any more difficulty sorting through the evidence and arguments because some of them are presented by a co-defendant.

II. PETITIONERS WERE NOT PREJUDICED BY BEING TRIED TOGETHER IN THIS CASE

Petitioners have failed to satisfy their burden of showing that, because they were tried together in this case, they received an unfair trial. To the contrary, petitioners have shown nothing more than that each of them was exposed in the joint trial to inculpatory evidence or argument from his or her co-defendant. For example, petitioners Soto and Garcia gave contradictory accounts of who went to petitioner Zafiro's apartment on the morning they were all arrested. And Soto complains that he was denied a fair trial because "instead of determining * * * the credibility of Soto, [the jury] had to determine Garcia's credibility in conjunction with Soto." Pet. Br. 11. Petitioner Martinez claims that he was prejudiced by being tried with Zafiro because Zafiro testified that the suitcase full of drugs found in her apartment belonged to Martinez, and that Soto and Garcia were coming to see Martinez when they brought the box full of cocaine. See *id.* at 14 ("Had the trial judge severed * * * [their] trials, the jury never would have heard Zafiro's prejudicial and biased testimony.").[7] Zafiro, in turn, contends that she was denied a fair trial because Martinez (through counsel) denied any knowledge of the illegal drugs that were found in or delivered to Zafiro's apartment. *Id.* at 14-15. Finally, Garcia claims that he was unfairly prejudiced because his defense at trial—that he never possessed any cocaine—was directly contradicted by Soto's testimony. *Id.* at 16-17.

Petitioners' claims amount to no more than assertions that they were subjected to contradiction by a co-defendant at trial. As we have discussed, there is nothing inherently unfair to a defendant about being contradicted by a co-defendant, and there was nothing unfair about exposing the jury to the conflicts among the defenses in this case. On the contrary, the verdicts were, if anything, more accurate because the jury, by hearing the accounts of all four petitioners, was apprised of the complete picture. Because Soto and Garcia differed about who had gone to Zafiro's apartment and who possessed the box full of cocaine, neither was able to assert without contradiction that the other was responsible for the drugs. Perhaps Soto and Garcia would have had a better chance of

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fendant—for example, an appeal to racial bias or an argument based upon facts not in evidence—the argument could be controlled by the court. A defendant is not entitled to make an improper closing argument, see *United States* v. *Young*, 470 U.S. 1, 13 (1985), and the possibility that a defendant will seek to make such an argument is no reason to adopt a flat rule against joining defendants who present antagonistic defenses. See *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2608 (1991) (risk of prejudicial conduct in particular cases, which is subject to control by the court, is not a sufficient reason for a general rule against a practice such as permitting the use of victim impact evidence in capital sentencing proceedings).

[7] In addition, Martinez complains that Zafiro's attorney emphasized Martinez's relationship with Maria Vera, another girlfriend of Martinez, whose car was found in Soto's garage with a large quantity of cocaine in the trunk. Pet. Br. 11-12.

acquittal if they had been tried separately, but it is likely that the jury in the joint trial was able to make a better assessment of their defenses because it was aware of them both.[8]

Similarly, although a separate trial might have allowed Martinez to claim ignorance of the contents of the suitcase without contradiction by Zafiro,[9] that

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[8] Former Chief Judge Clark made the same point forcefully in a case involving two co-defendants charged with possessing a weapon that had been found in the presence of both:

> The common defensive tactic used by both Crawford and Blanks was to claim that the other was the sole possessor of the contraband weapon. While the I-didn't-he-did defense of each defendant was antagonistic to the use of the same tactic by the other defendant, the common assertion of these cross-accusations could be reconciled under the third possibility: joint possession. * * * Even aside from the fact that [the weapon was] as apparent as an elephant in a bathtub, the government's contention of joint possession should not be ignored in the balancing process. The prejudice to prosecution resulting from separate trials in which each defendant could lay off on the other (who could make himself unavailable by invoking the fifth amendment) was a proper weight to place in the scales. The interest of the people in justice, which would be served by allowing a single jury to decide [among] the three possible versions * * * outweighs the privilege of the defendants to enjoy an advantage in the presentation of their respective disclaimers.

United States v. *Crawford*, 581 F.2d 489, 492-493 (5th Cir. 1978) (Clark, J., dissenting).

[9] Of course, Martinez's freedom from Zafiro's testimony would have been a function of happenstance. If Zafiro had been tried first and given immunity in exchange for her testimony, or if she had agreed to testify pursuant to a guilty plea or other cooperation agreement, Martinez would have been subject to her testimony in any case.

would only have meant the jury would have reached its verdict without ever knowing that Zafiro's position was that the suitcase belonged to Martinez.[10] While it is true, as Martinez notes, Pet. Br. 14, that Zafiro's testimony was subject to impeachment because of her motive to exculpate herself, the jury was obviously aware of her interest in the case and could take that factor into account in determining how much to credit Zafiro's testimony. It may well be that Martinez and Zafiro would have had a better chance of being acquitted if they had been tried separately, but those verdicts would have been based on incomplete information and thus would have been less reliable and potentially inconsistent as well.

Petitioners do not allege that any evidence was introduced at trial that could not have been introduced if the defendants had been severed for trial. Nor do they suggest that during closing argument their co-defendants made any unfairly prejudicial remarks that the prosecution would not have been permitted to make. Petitioners also do not challenge as insufficient the court's instruction regarding the jury's duty to "give separate consideration to each individual defendant and to each separate charge against him." Tr. 865. Indeed, the acquittal of Zafiro on several of the counts demonstrates that the jury was able to understand and compartmentalize the evidence presented at trial. See, *e.g.*, *United States* v. *Smith*, 918

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[10] Martinez's claim of prejudice from the testimony and argument relating to Maria Vera is similarly misplaced. If Martinez had been tried separately, the prosecution could still have introduced Vera's testimony. Accordingly, the prosecution could readily have shown that Vera was Martinez's girlfriend and that the police found cocaine in her car, just as police officers found cocaine in the apartment of Zafiro, another girlfriend of Martinez.

F.2d 1551, 1561 (11th Cir. 1990); *United States* v. *Nevils*, 897 F.2d 300, 305 (8th Cir.), cert. denied, 111 S. Ct. 125 (1990); *United States* v. *Garcia*, 848 F.2d 1324, 1334 (2d Cir. 1988), cert. denied, 489 U.S. 1070 (1989). Because petitioners have failed to identify any specific grounds for concluding that their joint trial rendered the jury's verdict unreliable, and because the mere presence of antagonistic defenses is not sufficient to justify a severance, the court of appeals was correct in holding that the district court did not abuse its discretion in deciding to try all four petitioners together.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

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GLORIA ZAFIRO, JOSE MARTINEZ,
SALVADOR GARCIA, ALFONSO SOTO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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QUESTION PRESENTED FOR REVIEW

Whether criminal defendants are entitled to separate trials when their defenses are mutually antagonistic.

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SUMMARY OF REPLY ARGUMENT

Rule 14 of the Federal Rules of Criminal Procedure provides the means for a trial court to sever defendants for separate trials when it appears that a defendant would be prejudiced by joinder of trial.

When co-defendants present mutually antagonistic defenses, their trial should be severed so as to ensure that each defendant receives the fair trial to which he is entitled.

The important rule that severance plays in ensuring fair trials has long been recognized by the 2nd, 4th, 5th, 6th, 7th, 10th, 11th, and D.C. Circuits. Indeed, the Seventh Circuit's ruling against the Defendants in the instant matter contradicts numerous cases in which it has previously recognized the critical nature of the severance doctrine.

The Seventh Circuit's ruling not only conflicts with its own previous holdings, this decision now places the Seventh Circuit in direct conflict with the above listed Circuits. This new rule fails to acknowledge the dangers posed by requiring defendants presenting mutually antagonistic defenses to be tried together. The Seventh Circuit's decision minimizes the Court's concern for ensuring each defendant a fair trial and instead focuses on its administrative concern for judicial economy.

REPLY ARGUMENT

The government's Brief acknowledges that the purpose of trial is to ascertain the truth, Brief for U.S. at

14-19, and candidly admits that defendants Soto and Garcia may have stood a better chance of acquittal if they had been tried separately. Brief for U.S. at 23-24. The government contends, however, that antagonistic defenses, the basis for the Defendants' request for separate trials in this case, is not sufficient grounds for severance. Brief for U.S. at 16-19.

The Government, however, fails to recognize that subjecting a defendant to a trial when his defense is irreconcilably in conflict with that presented by a co-defendant inflicts an injustice upon both defendants. Under such circumstances a defendant stands accused by two prosecutors, the Government and his co-defendant. Similarly, the jury watches as two parties point accusatory fingers at the defendant. The courts have recognized that if defendants are tried together under such conditions, they do not receive fair and impartial trials. These courts, through the application of Federal Rule of Criminal Procedure 14, have provided the defendants separate trials to protect the rights of the accused.

The language used by the various Circuit Courts of Appeal to articulate the standard used in determining when severance is appropriate to protect the rights of defendants has, not surprisingly, varied from case to case. For example, some courts have stated that severance is required when co-defendants present irreconcilable or mutually exclusive defenses and the jury will unjustifiably infer that the conflicting defenses, in and of themselves, establishes that both defendants are guilty. *See, e.g., United States v. Clark*, 928 F.2d 639, 644 (4th Cir. 1991); *United States v. Walton*, 552 F.2d 1354, 1361 (10th Cir. 1977), *cert. denied*, 431 U.S. 959 (1977); *United States v. Robinson*, 432 F.2d 1348, 1351 (D.C. Cir. 1970). In other

cases, the courts have stated that severance is required if the defenses are inconsistent to the degree that accepting one co-defendant's defense would preclude the jury from accepting the other's defense. *See, e.g., United States v. Rucker*, 915 F.2d 1511, 1513 (11th Cir. 1990); *United States v. Tutino*, 883 F.2d 1125, 1120 (2nd Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990); *United States v. Berkowitz*, 662 F.2d 1127, 1134 (5th Cir. 1981). Still others have indicated that severance is granted when the defendant demonstrates that the antagonistic defenses involved would mislead or confuse the jury. *See, e.g., United States v. Benton*, 852 F.2d 1456, 1469 (6th Cir. 1988), *cert. denied*, 488 U.S. 993 (1988).

However, although the language used to articulate the severance rule varies, the common element found throughout this line of cases is that defendants who present mutually antagonistic defenses should be granted severance, as conducting a joint trial under these circumstances would be unjust.

In *United States v. Ziperstein*, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), the court provided an example of mutually antagonistic defenses, stating:

> An example of "mutually antagonistic" defenses is presented in *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). In *DeLuna*, one defendant claimed that he came into possession of narcotics only when the other defendant saw the police approach and shoved the drugs into his hands. The other defendant, however, denied having ever possessed the drugs and claimed that they had always been in the possession of the first defendant. In a case such as *DeLuna*, where someone must have possessed the contraband, and one defendant can only deny his own

> possession by attributing possession and consequent guilt to the other, the defenses are antagonistic. *Ziperstein*, 601 F.2d at 285.

Interestingly, this is virtually the identical fact situation presented to the trial court in the instant case. There is no question that contraband was transported in a vehicle occupied by both Mr. Soto and Mr. Garcia, however, each defendant denied having ever possessed the drugs and claimed that the drugs were exclusively in the possession of the other defendant. Similarly, there was no question that contraband had been found in the apartment occupied by both Ms. Zafiro and Mr. Martinez, but each claimed that they were not the individual who possessed the drugs and instead argued that the drugs belonged to the other defendant. As in *DeLuna*, accepting one defendant's version of the facts necessarily resulted in finding the other defendant guilty. The defense presented by each Defendant required them to attack each others' defenses.

Not surprisingly, the Government states that it sees nothing unfair in requiring a defendant to face a co-defendant as an additional accuser. Brief for U.S. at 19-22. In fact, the Government goes so far as to propose that any prejudice which might flow from a co-defendant's acting as a second prosecutor is offset by the benefit the defendant obtains from the presence at trial of another potentially culpable defendant. Brief for U.S. at 20. The fallacy of this argument was clearly enunciated by the First Circuit in *United States v. Romanello*, where the court stated:

> Conspiracy trials, with their world-girdling potential, are given more extensive thrust by the

> admission of hearsay testimony, the use of conspiratorial acts to prove substantive offenses, and the joint trial of defendants. These pressures alone threaten to undermine the fair consideration of individual conspiracy defendants. However, the dangers inherent in joint trials become intolerable when the co-defendants become gladiators, ripping each other's defenses apart. In their antagonism, each lawyer becomes the government's champion against the co-defendant, and the resulting struggle leaves both defendants vulnerable to the insinuation that a conspiracy explains the conflict. *United States v. Romanello*, 726 F.2d 173, 182 (5th Cir. 1984).

Contrary to the Government's contention that there is some benefit to the presence of a mutually antagonistic co-defendant at trial, the *Romanello* court concluded that such a situation is likely to result in a jury unjustly finding the existence of a conspiracy. The court expressed its concern that when co-defendants attack each others' defenses before the jury, they blur together as one and, as a result, both defendants are likely to be convicted, as neither defense is believed. The court expressed this concern by stating:

> The joint trial of conspiracy defendants was originally deemed useful to prove that the parties planned their crimes together. However, it has become a powerful tool for the government to prove substantive crimes and to cast guilt upon a host of co-defendants. In this case, we are concerned with the specific prejudice that results when defendants become weapons against each other, clawing into each other with antagonistic defenses. Like the wretches in Dante's hell, they may become entangled and

> ultimately fuse together in the eyes of the jury, so that neither defense is believed and all defendants are convicted. Under such circumstances, the trial judge abuses its discretion in failing to sever the trials of the co-defendants. *Romanello*, 726 F.2d at 174.

The *Romanello* court recognized that a trial court faced with mutually antagonistic defenses abuses its discretion when it fails to ensure each defendant a fair trial. The Seventh Circuit, consistent with the decisions of the majority of other circuits, should likewise have recognized that the Defendants in this case were denied their opportunity for fair trials and should have reversed the trial court's denial of severance.

In addition to the obviously unjust situation which exists when a defendant must face two prosecutors, and the danger of confusion and blurring of roles, failure to sever defendants presenting antagonistic defenses also results in a shifting of the burden of proof from the Government to the defendant. Under these circumstances, not only is the defendant faced with convincing the jury that his version of the events is correct, the defendants faces the added, and unwarranted, burden of convincing the jury that his co-defendant's version of the events is not true.

The Seventh Circuit, in this instance, appears to have shown more concern for ministerial matters than it exhibited for protecting the rights of the defendants to fair trials.

Defendants acknowledge that judicial economy is an important concern for the court, and also recognize that

severance may not be appropriate under all circumstances involving a conflict between the co-defendants. However, the case before this Court involves not merely the antagonism caused by the different defenses of not guilty and entrapment (*United States v. Williams*, 858 F.2d 1218 (7th Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989)); nor the friction caused by the conflict of a non-participation defense and an insufficiency of evidence defense (*United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 173 (1990)); nor the discord caused by the conflict of a lack of knowledge defense and entrapment (*United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988), *cert. denied*, 490 U.S. 1074 (1989)). Under the circumstances presented in these cases, the Seventh Circuit has correctly ruled that severance is not required to ensure that defendants receive fair trials. However, until now, the court has consistently recognized the distinction between these types of conflicts and the much more serious situation which exists when co-defendants present truly antagonistic defenses. Previously, the Seventh Circuit, in conformity with the other Federal Circuits, had always recognized that confronting the jury with mutually antagonistic defenses required the Court to exercise its discretion and provide defendants with separate trials, and, until now, judicial economy, although considered by the court, always was subservient to protection of defendants' rights.

The Seventh Circuit's ruling in this case is not only in conflict with the other federal circuits, this decision conflicts with rulings and discussions in a number of previous cases within the Seventh Circuit itself. The importance of severance was previously recognized in

United States v. Shively, 715 F.2d 260 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); the prejudice which exists when co-defendants present mutually antagonistic defenses and the appropriateness of the use of Rule 14 severance under such circumstances was discussed in *United States v. Oglesby*, 764 F.2d 1273 (7th Cir. 1985); granting severance when accepting one defendant's defense precludes acceptance of a co-defendant's defense was acknowledged in *United States v. Buljubasic*, 808 F.2d 1260 (7th Cir. 1987), *cert. denied*, 484 U.S. 815 (1987) and *United States v. Gironda*, 758 F.2d 1201 (7th Cir. 1985); and, in *United States v. Ziperstein*, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) discussed above, the Seventh Circuit chose *DeLuna*, the facts of which are strikingly similar to the present case, to use as an example of mutually antagonistic defenses.

The Seventh Circuit's decision fails to acknowledge the long line of cases recognizing the appropriateness of severance under circumstances such as exist here and creates a direct conflict between the federal circuits.

When defendants present mutually antagonistic defenses they are prejudiced and cannot receive the fair trial to which they are entitled. When such prejudice exists, it is the court's "continuing duty at all stages of the trial to grant a severance." *Schaffer v. United States*, 362 U.S. 511 (1960).

This basic concept is denied by the Government, while it concedes that this case involves antagonistic defenses. Instead, it argues that a defendant is not unfairly prejudiced because his co-defendant acts as an

accuser. Brief for U.S. at 19-22. However, in *United States v. Crawford*, 581 F.2d 489 (5th Cir. 1978), the court was faced with a factual situation similar to that which exists here. In *Crawford*, the two defendants were each charged with possession of a firearm and each presented evidence that the firearm was owned by the other defendant. The court found that these defenses were irreconcilable as well as mutually exclusive. The sole defense of each was the guilt of the other. The Eleventh Circuit, discussing the prejudice which existed in *Crawford*, and the earlier, similar case of *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973), stated:

> The degree of prejudice suffered by the defendants in the *Johnson* and *Crawford* cases was truly compelling. In both cases, there were, in effect, two prosecutors, the government and the co-defendant. The defendants in *Johnson* and *Crawford*, respectively, were inseparably intertwined due to the fact that, in each case, there were only two defendants charged with a single offense. This made it impossible for any defendant to escape from the prejudicial impact ensuring from his co-defendant's 'He did it' defense. Despite this fact, the trial court in each case refused to grant a severance even when the irreconcilable nature of the defenses clearly manifested itself. *United States v. Kopituk*, 690 F.2d 1289, 1317 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983).

CONCLUSION

The Seventh Circuit's opinion in this case is not only an unwarranted departure from the existing law of severance, it is directly contrary to that body of law for cases involving antagonistic defenses. Failure to grant the Defendants' requests for severance denies them fair and impartial trials. This Court should reverse the decision of the Seventh Circuit and grant the Defendants new, separate trials.

Respectfully submitted,

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